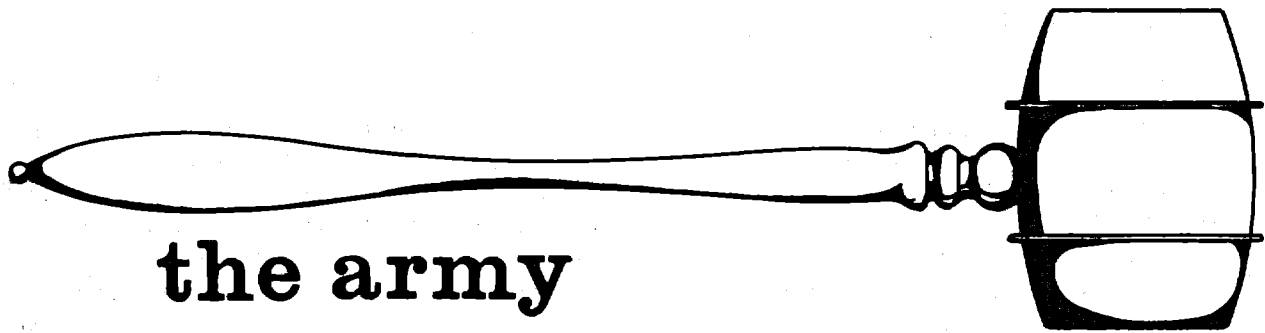


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Witness Production Revisited¹

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Since the restructuring of the Court of Military Appeals some eighteen months ago, several important cases in the area of witness production have been decided. In a forthright attempt to come to grips with this perplexing but important area of trial practice, the Court has considered several difficult problems pertaining to compulsory process. Unfortunately, not all existing questions have been answered and several new ones have been raised. Collectively, however, these decisions refine the law in this area and thus provide important guidance to military judges and counsel alike. This article is intended to be a review of where we are and a forecast of where we may be going. Most importantly, it is designed to assist the practitioner in understanding and using the law which the Court has given us. To achieve that end the following issues will be considered: (1) the required conditions precedent to production of defense witnesses at Government expense, (2) the production of live witnesses during the sentencing portion of trial, (3) the production of chemists upon defense request,

¹ This article is an update of "Witness Production and the Right to Compulsory Process," *The Army Lawyer*, Sep. 1980, 22-32.

(4) the viability of Manual Paragraph 115a's² requirements concerning witness production, and (5) the issuance of subpoenas prior to and during courts-martial proceedings.

United States v. Killebrew

In *United States v. Killebrew*,³ Chief Judge Everett had his first opportunity to discuss witness production. He did so in the context of a case wherein the accused's right to effective assistance of counsel was being litigated. *Killebrew* presented an interesting, although unusual, factual situation. The accused was charged with the sale of marihuana stemming from a transfer made by him to a government agent. That agent had been introduced to the accused by an informant. Prior to the preferral of charges, the informant had been transferred to a new duty station pursuant to an Air Force informant protection regulation. The informant's identity was not privileged since the government had provided the defense with both his name and his sworn statement. Notwithstanding this fact, accused's requests to personally meet with this prospective witness

were rebuffed by the government. Trial counsel refused to reveal to defense counsel the location of the witness or to make arrangements for a meeting, stating that the government had no intention of calling the informant as a witness on its case in chief. Furthermore, because the defense had not complied with Paragraph 115a's requirements for securing witnesses, trial counsel refused to physically produce the witness for trial. With the exception of an unsolicited phone call received by the defense counsel several days prior to trial from an unknown person claiming to be the informant, the defense never had an opportunity to interview the witness.⁴

In the majority opinion Chief Judge Everett reviewed in detail the discovery rights of a military accused. In so doing he provided explicit guidance regarding several witness production issues. It has long been recognized in military practice that the government need not produce a requested defense witness until the accused makes some legitimate averment of materiality

² Para. 115a, *Manual for Courts-Martial, United States*, 1969 (Rev. ed.).

³ 9 M.J. 154 (C.M.A. 1980).

⁴ Because the defense counsel was unable to adequately verify who the caller was, the Court of Military Appeals rejected the government argument that this communication fulfilled accused's right to a pretrial interview. See generally Annot., 79 A.L.R. 3d 79 (1977).

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which places the military judge on notice that the witness will offer testimony to negate the prosecution evidence or support a defense.⁵ Military courts have consistently held that requests based on unsubstantiated "hopes" of expected testimony do not qualify as proper averments.⁶ The unanswered question has always been, "What constitutes a legitimate averment?"

For the most part, averments have been based on either of two procedures: prior written statements of witnesses containing the substance of their proposed testimony or personal witness interviews by counsel. In *Killebrew* the Court provided guidance as to the latter procedure when it stated that the Manual for Courts-Martial does not require the government to transport either defense counsel or witnesses long distances for the purpose of pretrial interviews. Rather;

"... in cases where witnesses have been *transferred routinely* and are no longer available for personal interview at the place where the trial is to take place, defense counsel may have to resort to other expedients, such as telephone interviews, written questions or requests that associate defense counsel be detailed to interview the witnesses wherever they are located."⁷

The significance of this guidance is obvious. For the first time the Court of Military Appeals has provided explicit examples of how military defense counsel are to function with regard to requesting defense witnesses. No longer will counsel be able to submit a request for witnesses without first attempting to contact them. No longer will they be able to claim distance as the excuse for failing to do so. Essentially, the Court has informed defense coun-

sel of requirements that many have known about for some time but have failed to follow.

A second witness production issue discussed by the Court dealt with potential witnesses who refuse to discuss the case with the defense counsel prior to trial. Citing existing case law, the Court reaffirmed that a prospective witness may refuse to answer a defense counsel's pretrial questions so long as the government has not induced that refusal.⁸ The Court recognized, however, that such a practice could work great hardship on the accused by placing him in an untenable position. As noted earlier, defense witnesses will not usually be produced in the absence of a legitimate averment of materiality.⁹ Therefore, if a witness refuses to talk to the defense prior to trial, counsel will have no information upon which to base his averment. At that point the accused has two options: he can request that the convening authority authorize the taking of a deposition, and thus force the witness to submit to a pretrial interview, or he can simply forego calling the witness at trial. Acknowledging that a deposition may be denied "for good cause,"¹⁰ the Court suggested a way out of this dilemma:

"... when there is *some reason to believe* that a witness has knowledge *relevant* to criminal charges and he refuses to talk to defense counsel, there usually will be

⁵ The soundness of such a sweeping statement is questionable, and no military case on point was cited by the Court to support it. Although this may in fact be the case in the civilian sector, a commander can always order a soldier to cooperate fully with a defense counsel prior to trial. Failure to do so is punishable under Article 92, UCMJ. The provisions of Article 98, UCMJ, may also be employed to insure the cooperation of a reluctant military witness.

⁶ Although this case specifically deals with a potential prosecution witness, its guidance is applicable to witnesses for both the government and the defense. It is not unusual in the military for a potential defense witness to refuse to cooperate with defense counsel in order to avoid the exposure and inconvenience of a trial appearance. This is especially true when a soldier nears the termination of his time in service.

¹⁰ Article 49, UCMJ, 10 U.S.C. § 849.

⁵ *United States v. Lucas*, 5 M.J. 167 (C.M.A. 1978).

⁶ *United States v. Carey*, 1 M.J. 761 (A.F.C.M.R. 1975); *United States v. Young*, 49 C.M.R. 133 (A.F.C.M.R. 1974); *United States v. DeAngelis*, 12 C.M.R. 54 (C.M.A. 1953).

⁷ 9 M.J. 153, 161 (C.M.A. 1978).

lacking any 'good cause' to forbid his deposition or to refuse to compel his appearance at trial."¹¹

Although the above pronouncement seems clear-cut on its face, translating it into a meaningful tool for the trial lawyer is quite another matter. Is the Court saying that any uncooperative witness can be subpoenaed to give a deposition or to appear in Court? Close scrutiny of the statement indicates that certain restrictions do exist. For example, there must be "some reason to believe" that the witness can provide relevant evidence. Arguably, this standard is very slight. The source of the belief could come from prior oral or written statements of the witness, from the statements of third parties that the witness may have something of import to provide, or merely from the inference of knowledge arising out of the witness' presence at the scene of the crime.¹²

A second requirement is that what evidence the witness does have must be *relevant* to the crime being litigated. The Court's use of the term *relevant* in this context is important in that the usual standard for witness production is *materiality*, and the words differ significantly in their ultimate effect. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."¹³ This is a very broad standard designed to insure that anything that can assist to rationally resolve disputed issues at trial be admitted for the fact-finder's consid-

eration.¹⁴ Material evidence, on the other hand, must not only be helpful evidence, it must be evidence that is reasonably likely to have an effect on the fact-finder's eventual judgment. In other words, it must have an outcome determinative effect.¹⁵

By requiring that the defense only show that the uncooperative witness be able to provide relevant evidence, the Court has made an important concession in the area of compulsory process. Indeed, considering that the lower standard must be supported by no more than a simple belief that the witness can provide such evidence, it is obvious that the Court has acted to insure that the soldier's right to a fair trial be scrupulously protected.¹⁶

United States v. Courts

In *United States v. Courts*¹⁷ the Court of Military Appeals may have made its most sig-

¹¹ 9 M.J. 154, 161 (C.M.A. 1980).

¹² Such was the case in *United States v. Christian*, 6 M.J. 624 (A.C.M.R. 1978), where the Army Court of Military Review ruled that even though the defense was uncertain as to what a requested witness would say, an adequate showing of materiality had been made when both the trial and defense counsel agreed that if the witness had any testimony to provide at all, that it would support either the government or defense theory.

¹³ Military Rule of Evidence 401.

¹⁴ See, e.g., *United States v. Ives*, 609 F.2d 930 (9th Cir. 1979), where the court held that weak, even remote, defense evidence of mental responsibility was erroneously rejected by the trial judge. See also *United States v. McCullers*, 7 M.J. 824 (A.C.M.R. 1979).

¹⁵ By announcing this standard in *United States v. Hampton*, 7 M.J. 284 (C.M.A. 1979), the Court of Military Appeals adopted the definition of "materiality" provided by Professor Peter Westen of the University of Michigan, the foremost scholar in the area of compulsory process. In a landmark article discussing this topic, Professor Westen stated that, "...though evidence may be favorable and relevant to a defendant's case, he has no right to produce it if the impact of its exclusion will be too insignificant in the context of other evidence presented at trial to have any material bearing on the outcome." Westen, *Compulsory Process II*, 74 Mich. L. Rev. 191, 214 (1975).

¹⁶ Declaring that the accused had been denied meaningful access to a potential material witness, the Court remanded the case to The Judge Advocate General for dismissal of charges or the ordering of a limited rehearing to determine what information the witness could have provided. Art. 39(a), UCMJ; *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). If conducted, the record of such rehearing was ordered returned to the Court for determination of whether the accused had been prejudiced.

¹⁷ 9 M.J. 285 (C.M.A. 1980).

nificant and long-range contribution to the military law of witness production. There it upheld the trial judge's refusal to force a government paid production of a defense requested witness on sentencing. In so doing the Court for the first time implemented the guidance of *United States v. Scott*¹⁸ which provides that "although live testimony of . . . a [material] witness normally is imperative to the fairness of the process, occasionally some alternate form of testimony will pass muster under the facts and circumstances of a given case."

The compulsory process issue was raised in this case when the accused on the first day of a two day trial submitted to trial counsel a request that his sister be brought from her home in Indianapolis to the situs of the trial in Long Beach, California, to testify as a material witness on sentencing. After the trial judge sustained the government's refusal to physically produce the sister, her expected testimony was admitted by way of stipulation.¹⁹ In holding that the military judge had not abused his discretion, the Court listed the following factors to support its decision: (1) the substance of the sister's expected testimony; (2) the practical difficulties of physically producing her; (3) the availability to accused of other live testimony on the same topic; and (4) the timing of the request.

The vital question confronting the trial bar must now be: How far can *Courts* be extended? Does it stand for the proposition that material defense witnesses on sentencing no longer must be produced? Unfortunately, the brevity of the Court's opinion leaves unanswered these most provocative questions.

The discriminating defense counsel will try to limit *Courts* by noting that it really announces no new law. In any one of several ways the trial judge's decision could have been sustained on existing precedent. For example, since other witnesses on the same topic were available, the sister was cumulative in nature and therefore not required to be present.²⁰ Additionally, the untimely nature of the request could have allowed the trial judge to deny it as having been "delayed unnecessarily until such a time as to interfere with the orderly prosecution of the case."²¹

Such arguments, however, fail to explain why the Court did not adopt such an alternative to support its finding. Instead, it cited the broad language of *Scott* and deferred to the trial judge's discretion. In fact, the Court seems to have adopted Judge Cook's position in *United States v. Tangpuz*²² wherein four relevant factors were provided for the trial judge's consideration when ruling on such requests:

- (1) the issues involved in the case and the importance of the requested witness to those issues,
- (2) whether the witness is desired on the merits or on sentencing,
- (3) whether the witness' testimony would be merely cumulative,
- (4) the availability of alternatives to the personal appearance of the witness.

Although it may be premature to draw overly broad conclusions from this opinion, two comments seem to be in order. First, it would be ill-advised to assume that distance and expense alone is now enough to deny production of a material witness on either the merits or on sentencing. Such an assumption would cut

¹⁸ 5 M.J. 431 (C.M.A. 1978).

¹⁹ In *United States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976), the Court held that the compelled stipulation of a material witness' expected testimony is not an adequate substitute for the personal appearance of the witness. The witness denied in *Carpenter*, however, was prepared to testify on a matter that went to the "core" of the accused's defense as opposed to a matter on sentencing only.

²⁰ *United States v. Williams*, 3 M.J. 239 (C.M.A. 1977).

²¹ *United States v. Hawkins*, 19 C.M.R. 261 (C.M.A. 1955).

²² 5 M.J. 426 (C.M.A. 1978).

against firmly established precedent.²³ The Court's mention of these factors, however, is significant in that it exhibits a recognition that physical as well as fiscal difficulties are matters which the trial judge may consider in making his ultimate decision.²⁴ Secondly, in this case the Court seems to make a definite distinction between a witness on the merits and a witness on sentencing. It is inconceivable that the military high court would ever deny an accused a truly material witness on the merits if such a witness was known to exist and available to testify—to do so would certainly be a violation of the accused's sixth amendment right to compulsory process.²⁵ Denial of such a witness on sentencing, however, seems to be another matter, provided the witness' testimony is presented in court through the vehicle of some acceptable alternative to physical presence.²⁶

²³ *United States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976); *United States v. Willis*, 3 M.J. 94 (C.M.A. 1977).

²⁴ *United States v. Davis* 41 C.M.R. 217 (C.M.A. 1970), held that distance alone never makes a serviceperson unavailable as a material witness on the merits, a position in accord with *Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S.Ct. 1318 (1968), wherein the Supreme Court held that alternatives to live testimony are admissible only when there is a showing of the witness' actual unavailability. Accord, *United States v. Obligation*, 37 C.M.R. 300 (C.M.A. 1967). It has always been assumed that "military necessity" could, under the proper circumstances, support the use of alternatives to physical production of a material witness. Whether any sort of operational requirement short of actual combat will qualify as a "military necessity" is an unresolved issue. *United States v. Davis*, *supra*; See also Melnick, "The Defendant's Right to Obtain Evidence: An Examination of the Military Viewpoint," 29 Mil. L. Rev. 1 (1965).

²⁵ *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965); *Chambers v. Mississippi*, 410 U.S. 294, 93 S.Ct. 1038, 35 L.Ed 2d 297 (1973); *Barber v. Page*, *supra*; *United States v. Thornton*, 24 C.M.R. 256 (C.M.A. 1957).

²⁶ On 1 August 1981, Paragraph 75 of the Manual for Courts-Martial was amended pursuant to executive order. Portions of that Paragraph provide for major changes with regard to production of witnesses on sentencing. The amendment essentially adopts the present Court of Military Appeals' orientation pertaining to this issue but provides specific guidance on

United States v. Vietor

Because of the frequency of drug prosecutions in the military, attendance of the laboratory examiner at trial has long been a matter of acute concern to both military trial and appellate courts. In a line of cases spanning a nine year period the Court of Military Appeals has consistently held that a laboratory report used to prove the nature of a chemical substance is admissible as a business entry exception to the hearsay rule.²⁷ As such, the report can be admitted into evidence without the government's having to call the examiner as a witness.²⁸ The long standing issue considered in *United States v. Vietor*²⁹ concerned when, if ever, the accused can call the examiner as a witness at trial.

In *United States v. Evans*³⁰ the Court of Military Appeals first spoke to this issue when it stated:

"While we agree that the report of a government chemical examiner is sufficiently

when production of such witnesses may be required. Discretion remains with the military judge subject to five limitations. Those limitations essentially provide for a live production of defense witnesses only when the expected testimony of the witness is of such relevance, weight, and credibility as to have a substantial significance on the determination of an appropriate sentence. The amendment further provides a balancing test applicable to the judge's determination in which the significance of the witnesses appearance is weighed against the practical difficulties of producing the witness. Application of such a test would seem to be in complete conformity with the guidance set out by the Court of Military Appeals in *United States v. Courts*, *supra*.

²⁷ *United States v. Evans*, 45 C.M.R. 354 (C.M.A. 1972); *United States v. Miller*, 49 C.M.R. 380 (C.M.A. 1974); *United States v. Strangstalien*, 7 M.J. 255 (C.M.A. 1979). MRE 803(6) specifically adopts this position. RE 803(8) also allows for admission of such reports as official records.

²⁸ A foundation for the report's admission as a business entry must still be laid by a witness familiar with the operation of the crime laboratory, usually the local CID evidence custodian.

²⁹ 10 M.J. 69 (C.M.A. 1980).

³⁰ 45 C.M.R. 354 (C.M.A. 1972).

trustworthy to justify its admission in evidence as a business entry ... we do not intimate that the accused must forego the right to attack the report's accuracy. If he wishes to do so, he may have the analyst summoned and attack the regularity of the test procedures and the competency of the ... [person] who ran the test ... But these factors ... go to the weight of the evidence rather than to its initial admissibility."³¹

Subsequent pronouncements by the Court made it clear that the accused had the right to call the chemist as an *adverse witness* and subject him to cross-examination on the issues noted in *Evans*.³² Many counsel in the field interpreted this to mean that the accused had an absolute right to produce the chemist regardless of whether the defense could articulate any reason to believe that the witness would be favorable to its case.

Because of the law's uncertainty, some prosecutors acquiesced to unsupported defense witness requests and produced chemists for trial without requiring that a legitimate showing of expected testimony be presented. One who did not was the trial counsel in *United States v. Vietor*.³³ There the accused was being tried for transfer, possession, and sale of marijuana. Trial was held in Hawaii and the drugs involved had been analyzed in a laboratory located in Japan. Three days prior to trial the accused requested that the chemist who had prepared the lab report be made available to testify. The defense counsel had not spoken to the chemist and had no reason to believe that he would provide favorable testimony. In denying the defense request, the trial judge held that the defense had made no showing that the requested chemist was either unqualified or that his test procedures were improper.

The Navy Court of Military Review in sustaining the trial judge's decision held that "something more than the base request for the witness must be submitted to justify his being called."³⁴ Indeed, the Court opined that the formal requirements of Para. 115a had to be met before any such request would be fulfilled.³⁵

With the issues clearly joined, the Court of Military Appeals was called upon to resolve these difficult and controversial problems—problems which confront the military trial lawyer on a daily basis and which account for the expenditure of great human and financial resources. The Court's response to this challenge came in the form of three separate opinions which at times evidence widely divergent positions. Briefly put, the judge's positions can be summed up as follows: Judge Fletcher feels that a chemist must always be produced upon a defense request less the government can show that he is either unavailable or that the utility of trial confrontation is too remote. Judge Cook does not believe that accused has an automatic right to the presence of the chemist, but can force production of the witness once he has established a need to examine him. Finally, Chief Judge Everett feels that once the defense counsel has communicated with the analyst and seeks to have him produced as a hostile witness for purposes of cross-examination, the materiality of his proposed testimony need not be demonstrated in detail, and he must be produced. Let us now consider each position in greater detail.

Judge Fletcher, unlike his colleagues, felt that the admission of the laboratory report under these circumstances constituted a violation of the accused's sixth amendment right of con-

³¹ *Id.* at 356.

³² *United States v. Miller, supra*; *United States v. Strangstalien, supra*.

³³ 10 M.J. 69 (C.M.A. 1980).

³⁴ 3 M.J. 952, 954 (N.C.M.R. 1977).

³⁵ In *United States v. Niederkorn*, 50 C.M.R. 341 (A.C.M.R. 1975), one panel of the Army Court of Military Review agreed in principle with the Navy Court but was very careful to avoid suggesting that the explicit requirements of Para. 115a be met as a condition precedent to production of the witness.

frontation, and joined in the Court's decision to order a limited hearing simply to determine whether prejudice resulted therefrom. In essence, Judge Fletcher was unwilling to accept military precedent³⁶ pertaining to hearsay exceptions in the wake of *Ohio v. Roberts*,³⁷ the Supreme Court's most recent pronouncement in this area. In *Ohio v. Roberts* the Supreme Court upheld a conviction in which the former testimony of a witness was introduced over defense objection. Relying upon precedent, the Supreme Court stated that hearsay evidence is generally admissible at trial if the declarant is available and the evidence itself bears "indicia of reliability." Applying that standard to *Vietor*, Judge Fletcher took the position that the government had failed to make any showing that the chemist was either unavailable or that "good faith" efforts to secure his presence had been made. Therefore, the laboratory report was inadmissible as a matter of constitutional law.

Only the Chief Judge responded to Judge Fletcher's dissenting view, and in so doing rejected a literal application of *Ohio v. Roberts* to the case at bar. Focusing on the Supreme Court's concern for the reliability and trustworthiness of a hearsay statement, Chief Judge Everett spoke of exceptions of the confrontation right which have been established through both military and civilian case law. He acknowledged that a literal application of the confrontation clause would effectively exclude all out of court declarations regardless of their reliability and that exceptions to the confrontation clause—many of which conform substantially to well-recognized hearsay exceptions—have been fashioned over time to avoid such a result. By distinguishing between constitutional exceptions to the confrontation clause and evidentiary exceptions to the hear-

say rule, Chief Judge Everett avoided the troublesome first prong of *Ohio v. Roberts*, i.e., the requirement that the Government show unavailability of the witness prior to introducing that witnesses' hearsay declaration. This position reaffirmed prior military case law which has long been that laboratory reports are admissible as business records exceptions to the hearsay rule even without the live testimony of the chemist who prepared the report.³⁸

The Chief Judge next addressed what he called the "real issue" of this case—the question of whether the accused's sixth amendment right to compulsory process had been violated by the trial judge's refusal to grant the defense request for production of the chemist.³⁹ In the course of doing so he discussed the role of Para. 115a in the area of witness production.

Para. 115a is the Manual provision which requires the defense to make written pretrial requests to trial counsel in order to secure the

³⁶ Judge Fletcher's opinion in *Vietor* evidences a very definite shifting of his position from previous cases in which hearsay exceptions have been considered in the context of the sixth amendment confrontation right. See *United States v. Strangstalien*, *supra*.

³⁷ ____ U.S. ____, 100 S.Ct. 2531 (1980).

³⁸ It is beyond the scope of this article to discuss in detail the perplexing relationship of the confrontation clause to the hearsay rule. Suffice it to say that the military high court, not unlike its civilian counterparts, is still searching for an answer to this difficult problem. It is this author's view, however, that Chief Judge Everett comes closer to the mark in defining how these two concepts interrelate than does Judge Fletcher.

³⁹ In discussing this issue, Chief Judge Everett referred extensively to the writings of Professor Peter Westen. It is Westen's theory that the rights of confrontation and compulsory process enunciated in the sixth amendment are two sides of the same coin, the essential difference between the two being only the question of who has the burden of producing a witness at trial. Conventional wisdom holds that the right of confrontation insures for the accused an opportunity to confront witnesses *against* him, while compulsory process provides the defense with the right to produce witnesses *in his favor*. It is Professor Westen's theory, however, that, "What distinguishes a witness 'against' the accused from a witness 'in his favor' is not the content of the witness' testimony but the identity of the party relying on his evidence." This novel approach would allow the accused to force the production of any witness he desires, favorable or otherwise, provided he first establishes the materiality of the witness' expected testimony.

government paid production of defense witnesses. Specifically, requests must contain:

- (1) A synopsis of the testimony of the requested witness.
- (2) Reasons which necessitate the personal appearance of the witness.
- (3) Any other matter showing that the expected testimony is necessary to the ends of justice.

This provision has come under attack in the past for being inconsistent with the UCMJ provision that the accused shall have an "equal opportunity" with the government to secure evidence in its favor;⁴⁰ but the Court of Military Appeals, while acknowledging the problem, has always refused to address it head on.⁴¹ Chief Judge Everett was not so reluctant. He stated that the government is entitled to advance notice of accused's witnesses in order for it to either "arrange for the presence of the witness or to explore legally permissible alternatives," and that Para. 115a adequately performs that function.

The Chief Judge did state, however, that limits exist to the conditions that the government can place on the accused. In fact, there are some circumstances when a rigid application of Para. 115a's requirements could produce a conflict with the Sixth Amendment right to compulsory process. For example, a hostile witness often refuses to cooperate with the defense prior to trial and therefore makes it impossible for the accused to meet the literal requirements of Para. 115a. To deny production of a witness under such circumstances would certainly be a denial of accused's constitutional right.

This position is extremely important in that it is bottomed on the accused's sixth amend-

ment right to compulsory process, not on a statutory interpretation of Article 46. Moreover, it is consistent with the language of *Killebrew* wherein the Court held that there are times when a defense witness must be produced even though the accused can make no legitimate averment of materiality.⁴²

Applying these standards to *Vietor*, the Chief Judge held that the requested chemist was in actuality an adverse witness whose materiality was established once the government decided to offer his report into evidence. The trial counsel therefore could not defeat accused's right to compulsory process by simply invoking the requirements of Para. 115a.

Chief Judge Everett then joined Judge Cook in declaring that the defense counsel in this case was remiss in making no effort to communicate prior to trial with the chemist whom he had proposed to call as a witness. He went on to voice agreement with Judge Cook on another essential point—that the accused generally has no automatic right to the attendance of the chemist who prepared the laboratory report, but must instead make some showing of his need to examine the witness in open court before production will be required. No guidance was provided as to what constitutes an adequate showing, but presumably it would have to cast some doubt on the chemist's personal qualifications and/or his laboratory procedures.⁴³

⁴² See note 7.

■ The Chief Judge seems to have taken an inconsistent position by declaring the witness to be a "material" adverse witness, and yet requiring the accused to show a personal need for producing him. Such a position is at odds with those cases which declare that once a witness is shown to be material the government must produce that witness or abate the proceedings. *United States v. Carpenter, supra*; *United States v. Willis, supra*; *United States v. Jouan, 3 M.J. 136 (C.M.A. 1977)*. A broader view of Chief Judge Everett's opinion, however, shows it to be consistent with the definition of materiality set out in *United States v. Hampton, supra*, which implies that for purposes of compulsory process no witness is truly material unless the accused can show that the witness will either support a specific defense or somehow undermine the government's case.

⁴⁰ Article 46, UCMJ, 10 U.S.C. § 846.

⁴¹ *United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976)*; *United States v. Arias, 3 M.J. 436 (C.M.A. 1977)*; *United States v. Tangpuz, 5 M.J. 426 (C.M.A. 1978)*. J. Fletcher dissenting in *Arias* declared that Para. 115a's requirements are "improper."

United States v. Roberts

In *United States v. Roberts*,⁴⁴ the Court of Military Appeals considered several important issues pertaining to witness production, to include the accused's right to compel the attendance of witnesses at an Article 32 investigation, the right of an accused to the pretrial deposition of a potential witness, and the accused's right to subpoena defense witnesses at trial. Although the court broke no new ground in its decision, it did provide valuable guidance and raised several provocative questions.

The basic facts of this case are quite simple. The accused was charged with stabbing his wife with a knife during the course of a domestic quarrel which occurred in an off-post apartment in Germany. Twelve days after the incident the victim-wife returned to the United States of her own accord after providing the CID with an unsworn and unsigned statement. She rebuffed all subsequent government requests to provide either a sworn statement or deposition concerning the assault and refused to voluntarily return to Germany at government expense for the court-martial against her husband.

The first issue considered by the Court was the Investigating Officer's refusal to produce Mrs. Roberts as a witness at the Article 32 investigation. It thus confronted an important area of pretrial practice which has been cloaked in a mantle of confusion for some time. To better understand the Court's decision in *Roberts*, a brief review of the law in this area is required.

Article 32(b) states that the accused at a pretrial investigation will be given a "full opportunity ... to cross-examine witnesses against him *if they are available*."⁴⁵ It is the phrase "if they are available" which creates problems since neither the Code nor the Manual provide guidance as to its interpretation. In *United States v. Ledbetter*,⁴⁶ the Court ac-

knowledgeed that the statutory standard of confrontation for Article 32 investigations differs from the constitutional standard applied to criminal trials and enunciated a test to determine when a witness was "available" for purposes of Article 32. Specifically, the Court required a balancing of two competing interests: the significance of the witness' testimony versus the relative difficulty and expense of obtaining the witness' presence at the investigation.⁴⁷

In *United States v. Chestnut*⁴⁸ the Court again considered this issue in a case arising out of USAREUR. There the accused requested that the alleged rape victim, a German national living fifty miles from the situs of the Article 32 hearing, be physically produced and made subject to cross-examination under oath. Without making any effort to secure her attendance, the investigating officer denied the defense request and considered instead her sworn statement. At trial the military judge denied a defense motion to reopen the pretrial investigation as well as a motion for a continuance to take the witness' deposition. In reversing the accused's conviction, the Court held that the military judge had abused his discretion by simply accepting the investigating officer's conclusory assumption that the witness was unavailable rather than forcing the government to support this position by an actual showing of circumstances or exigencies which precluded production of the witness. As a result, the balancing criteria of *Ledbetter* had not been met,

⁴⁷ In *Ledbetter* the Court ruled that the denial of accused's request for the live presence of the key government witness at the Article 32 hearing was a deprivation of a substantial pretrial right which required a reversal of the conviction and a reopening of the pretrial investigation. In taking the drastic step of reversing the accused's conviction, the Court was adhering to long established precedent first set out in *United States v. Mickel*, 26 C.M.R. 104 (C.M.A. 1958), where the Court said, "... if an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right without regard to whether such enforcement will benefit him at trial."

⁴⁴ 10 M.J. 308 (C.M.A. 1981).

⁴⁵ Article 32(b), UCMJ, 10 U.S.C. § 832(b).

⁴⁶ 2 M.J. 37 (C.M.A. 1976).

⁴⁸ 2 M.J. 84 (C.M.A. 1976).

and the accused had been denied a substantial pretrial right requiring a reversal of his conviction without regard to whether he had been prejudiced at his actual trial.

In rejecting the accused's appeal in *Roberts*, the Court reasserted its willingness to defer to the investigating officer's discretion in matters of pretrial witness production. Moreover, it emphasized that although the military accused is afforded important pretrial discovery rights at an Article 32 investigation, such discovery is not the sole purpose of the proceeding.⁴⁹

The second issue considered by the Court was the military judge's refusal to grant accused's request for a subpoena to compel Mrs. Roberts to submit to a pretrial deposition. The Court upheld the trial judge's decision on the solitary point that the defense had made no showing that the witness' testimony was material to the facts in issue. Furthermore, it reviewed the facts of this case to show that the defense counsel had spoken to Mrs. Roberts over the phone and therefore had it within his power to make an appropriate averment had the expected testimony been in fact material.

The final compulsory process issue considered by the Court was the trial judge's refusal to order Mrs. Robert's production at trial, or in lieu thereof an abatement of the proceeding. Again, the Court's affirmance of the trial judge's ruling was based on accused's failure to make a proper showing of the witness' materiality.

Without question the most interesting and provocative comments made by the Court in *Roberts* were contained in the majority opinion's lengthy footnotes. Therein, the Court discussed the process for issuing subpoenas in the military, emphasizing two particular areas: the authority of an investigating officer to subpoena witnesses to appear at an Article 32 investigation, and the power of a military court to subpoena a witness in the United States to appear at a court-martial abroad. Although the Court declined to resolve either issue, it did provide insight as to how it might respond in the future.

After acknowledging the generally held notion that there exists no authority to compel a civilian to attend an Article 32 investigation, the Court proceeded to make a compelling argument for rejecting that position. Citing the congressional intent that process in the military be similar to that available in the federal courts, the Court pointed out that federal grand juries and magistrates conducting preliminary hearings have authority to issue subpoenas.⁵⁰ Additionally, the legislative history of Article 32, as well as the development of Para. 115 of the Manual, all argue in favor of granting such power to the investigating officer.⁵¹ From the tenor of the Court's language and the obvious research it has done in the area it would appear that the Court is prepared to resolve this issue when it is raised in an appropriate case.⁵²

A second area of contention raised in a footnote had to do with compelling a witness in the

⁴⁹ The legislative history of Article 32(b), as well as subsequent judicial interpretation of the statute, make it quite clear that the pretrial investigation is designed to achieve two ends: (1) it is the vehicle by which the convening authority insures that baseless charges are not referred to trial, and (2) it operates as a discovery tool for the accused. *United States v. Samuels*, 27 C.M.R. 280 (C.M.A. 1959). In *Roberts* the Court makes it clear that the Article 32 hearing is not exclusively a discovery proceeding for the accused, nor can the accused force a rehearing simply because all desired witnesses were not produced. The requirements of Article 32 will be met provided a thorough and impartial investigation of the charges is conducted.

⁵⁰ Fed. R. Crim. P. 5.1(a).

⁵¹ See footnote 4, *United States v. Roberts*, 10 M.J. 308, 312 (C.M.A. 1981).

⁵² Para. 2-38, AR 27-10 (C20, 15 Aug. 1980), authorizes payment of transportation expenses and per diem allowances to civilian witnesses appearing before Article 32 investigations only upon approval by the general court-martial convening authority. In deciding whether to approve such a request, the general court-martial convening authority must determine that the witness is essential to the successful completion of the investigation, and that his absence may result in a manifest miscarriage of justice.

United States to appear at a court-martial conducted in a foreign country. The Court of Military Appeals has never directly addressed this problem although in *United States v. Daniels*⁵³ it did conclude that a court-martial has no statutory authority to issue a subpoena to an American citizen in a foreign country to appear in a military court held abroad.⁵⁴ The Army Court of Military Review, however, in *United States v. Boone*⁵⁵ stated categorically that a court-martial has no authority to subpoena a witness in the United States to appear at a trial held in a foreign country. In Footnote 7 of *Roberts*, the Court of Military Appeals dissociated itself from the position and left for another day the resolution of this problem.

Unlike the issue of subpoenas at Article 32 investigations, the Court's comments regarding this matter were perfunctory in nature and provided little insight into future resolution of the issue. This posture most likely reflects the improbability that military courts do in fact possess such power. The notion that the United States government could force a civilian citizen to leave the United States, thus involuntarily subjecting that person to the vagaries of foreign legal systems, not to speak of grave personal danger in time of war, seems to cut against general principles of due process.⁵⁶ The likelihood of a federal court quashing such a subpoena is great, especially since the UCMJ specifically allows for the taking of depositions under such circumstances.⁵⁷

⁵³ 48 C.M.R. 655 (C.M.A. 1974).

⁵⁴ Under 28 U.S.C. § 1783 (1976), made applicable to the armed forces through Article 46, military authorities can subpoena American citizens from throughout the world to appear before courts-martial held within the United States or its possessions.

⁵⁵ 49 C.M.R. 709 (A.C.M.R. 1975).

⁵⁶ The practitioner in the field will not have long to wait for an answer to this question since the issue is presently before the Court in *United States v. Bennett*, A.F.C.M.R. 22664, pet. granted, 10 M.J. 251 (C.M.A. 1981).

⁵⁷ Article 49, UCMJ, 10 U.S.C. § 849.

Conclusion

This article has reviewed the most recent Court of Military Appeals cases dealing with compulsory process in an attempt to shed some light on where the Court is going in this area. As is so often the case with decisional law, distilling firm rules from judicial opinions is a risky enterprise. With that caveat in mind, the following observations are offered:

- (1) The days of unsupported requests for defense witnesses are over. To successfully secure a witness at government expense, defense counsel must make good faith efforts to contact potential witnesses, whether by way of personal interview, telephone conversation, written correspondence, or the employment of associated counsel at a distant locale. Only in the most limited of circumstances will witnesses be produced without such personal advance contact.
- (2) Alternatives to the physical production of defense witnesses on sentencing will be countenanced provided the military judge insures that the testimony of the witness gets before the fact-finder in some fashion which does not undermine the court-martial process.
- (3) There exists no absolute right to the presence of a chemist in cases involving drug litigation. Before such a witness will be produced the accused must make some showing that the analyst will be able to provide testimony favorable to the defense position.
- (4) The requirements of Paragraph 115a serve a legitimate purpose and must be complied with in all but the most limited of circumstances.
- (5) In determining whether defense witnesses must be produced at Article 32 investigations the balancing test of *Ledbetter* will be applied, and the Court will defer to the judgment of the investigating officer regarding such matters.
- (6) Whether a witness is requested to appear for a defense on the merits at trial or at a pretrial deposition hearing, physical production will turn on whether or not the accused properly avers the materiality of the witness' proposed testimony. In deciding whether material-

ity exists, the Court will defer to the trial judge's discretion.

With regard to the other questions raised in this article, we will have to await future judi-

cial movement before attempting to forecast a response. Judging from the Court's current rate of activity, however, answers to many of those questions will not be long in coming.

DOPMA Correction: Not a Mere Technicality

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I. Introduction

In the gargantuan process of revising the entire statutory framework for officer personnel management, it is understandable that numerous minor errors, omissions, miswordings, and inconsistencies will occur and will be discovered by those attempting to implement such legislation. The need to provide an opportunity for corrections was recognized prior to the adoption of the Defense Officer Personnel Management Act (DOPMA)¹, and prompted the delayed implementation date for most DOPMA provisions.² The Defense Officer Personnel Management Act Technical Corrections Act (DOPMA TCA) was approved by Congress as "noncontroversial"³ legislation, and was signed into law by President Reagan on 10 July 1981.⁴ The corrections may appear to be merely technical in nature, but without them the substance of statutory interpretation in individual cases might be radically different. Thus, the importance of the DOPMA TCA to both commissioned officers and their personnel managers cannot be denied. The purpose of this article is to briefly summarize the major provisions of

the DOPMA TCA as they relate to three topics of concern to all officers: (1) appointment and order to active duty; (2) promotion; and (3) retirement.

II. Appointment and Order to Active Duty

A. Original Appointment in the Regular Army

Current statutory provisions for determining an officer's grade upon appointment in the Regular Army⁵ will be repealed by DOPMA⁶ as part of the effort to establish uniform appointment procedures.⁷ However, DOPMA filled this gap only in the case of a Regular Army appointee who, *immediately prior* to such appointment, held a Reserve commission.⁸ No other statutory methodology for determination of Regular Army appointment grades was provided.

In addition to expanding and clarifying the grade determination technique for Reserve commissioned officers transferring to the Regular Army,⁹ DOPMA TCA takes the additional

¹ Public Law 96-513, 94 Stat. 2835, 12 December 1980 (hereinafter cited as Pub. L. 96-513); See Bent, *DOPMA: An Initial Review*, *The Army Lawyer*, (April 1981) at 1-17.

² H.R. Report No. 96-1462, 96th Cong., 2d Sess. 45 (1980) hereinafter cited as H.R. Rep. No. 96-1462; H.R. Rep. No. 97-141, 97th Cong., 1st Sess. 1-2 (1981) (hereinafter cited as H.R. Rep. No. 97-141); and Pub. L. 96-513, sec. 701.

³ This term of art refers to the relative ease with which DOPMA TCA traversed the *formal* legislative process.

⁴ Pub. L. 97-22, ____ Stat. ____, 10 July 1981.

⁵ 10 U.S.C. §§ 3288, 3290, 3291, 3292, and 3294.

⁶ Pub. L. 96-513, sec. 204.

⁷ H.R. Rep. No. 96-1462, at 90-91.

⁸ 10 U.S.C. § 533(f), as added by Pub. L. 96-513, sec. 104(a).

⁹ 10 U.S.C. § 531, as added by Pub. L. 96-513, sec. 104(a), as amended by Pub. L. 97-22, sec. 3(a)(2), specifically references the grade determination procedures in 10 U.S.C. 533(f), as added by Pub. L. 96-513, sec. 104(a), as amended by Pub. L. 97-22, sec. 3(c)(5), which provides the following rules: (1) A Reserve commissioned officer on the active-duty list immediately before appointment in the Regular Army is appointed

step of expressly authorizing the Secretary of Defense to promulgate regulations to determine the appointment grade of a person credited with service under 10 U.S.C. § 533¹⁰ (either prior active commissioned service or constructive service) who is *not* a Reserve commissioned officer.¹¹ DOPMA TCA requires that such regulations "base" the grade determination on the amount of service credited;¹² that is, Congress intends that the service to be credited to the applicant should be compared with the service of officers on the active-duty list of the appropriate competitive category and then that the applicant be appointed in the grade held by officers with corresponding active-duty list service.¹³ Appointment grade for persons with a given amount of service may vary over time, based on the timing of active-duty list promotions.¹⁴ Thus, both appointment grades and promotion timing will respond directly to the manpower needs of the Army.¹⁵

The only gap in the methodology for determining Regular Army appointment grades remaining after DOPMA TCA is in the case of appointees who are neither Reserve officers nor persons credited with actual or constructive service (e.g., graduates of the United States Military Academy do not receive credit for

service, education, training, or experience obtained before graduation¹⁶). However, as such persons have no basis for appointment in a higher grade, it is presumed that they will continue to be nominated for original appointment in the Regular Army in the grade of second lieutenant.¹⁷

B. Order of Reserve Officers to Active Duty

As DOPMA repeals the general authority for temporary appointments,¹⁸ it was originally assumed that it would be appropriate, thereafter, to order a Reserve officer to active duty in the officer's Reserve grade.¹⁹ However, this resulted in an unintended devaluation of service credited to Reserve officers who are appointed coincident with order to active duty. For example JAGC accessions would be appointed in the grade of first lieutenant with no time-in-grade, and thus when ordered to active duty they would be eligible for promotion to captain only after serving two years as a first lieutenant.²⁰

DOPMA TCA solves this problem by amending 10 U.S.C. § 689²¹ to authorize a Reserve officer, who is credited with service (either prior commissioned service or constructive service) under 10 U.S.C. § 3353,²² to be ordered to active duty with a reserve grade, a date of rank, and position on the active-duty

in the same grade and with the same date of rank as that held by the officer on the active-duty list immediately before Regular Army appointment; and (2) A Reserve commissioned officer not on the active-duty list immediately before appointment in the Regular Army is appointed in the same grade and with the same date of rank as that which the officer *would have held* had the officer been serving on the active-duty list on the date of the Regular Army appointment.

¹⁰ As added by Pub. L. 96-513, sec. 104(a), as amended by Pub. L. 97-22, sec. 3(c).

¹¹ Pub. L. 97-22, sec. 3(a)(2), amending 10 U.S.C. § 531, as added by Pub. L. 96-513, sec. 104(a).

¹² *Id.*

¹³ H.R. Rep. No. 97-141, at 8.

¹⁴ *Id.*

¹⁵ See 10 U.S.C. § 623(a), as added by Pub. L. 96-513, sec. 105.

¹⁶ 10 U.S.C. § 533(d)(2), as added by Pub. L. 96-513, sec. 104(a).

¹⁷ See general authority for appointments, 10 U.S.C. § 531, as added by Pub. L. 96-513, sec. 104(a).

¹⁸ 10 U.S.C. § 3442(c), repealed by Pub. L. 96-513, sec. 207.

¹⁹ Compare 10 U.S.C. § 3494, repealed by Pub. L. 96-513, sec. 209(a) with 10 U.S.C. § 689, as added by Pub. L. 96-513, sec. 106.

²⁰ This problem is fully discussed in Bent, *supra* note 1, at 9-10.

²¹ As added by Pub. L. 96-513, sec. 106, as amended by Pub. L. 97-22, sec. 4(g).

²² As amended by Pub. L. 96-513, sec. 205(a), and further amended by Pub. L. 97-22, sec. 5(c).

list determined under regulations prescribed by the Secretary of Defense.²³ Congress intends that such determinations be made by relating the amount of service credited to the service of officers on the active-duty list.²⁴ For example, such a DOD regulation might result in a non-prior service JAGC accession being ordered to active duty as a first lieutenant with a date of rank and position on the active-duty list *as if* the officer had been on active duty for the entire period of constructive service (three years). Thus, such a JAGC officer might be ordered to active duty as a first lieutenant with eighteen months time-in-grade,²⁵ and would be *eligible* for promotion to captain six months later.²⁶ It should be emphasized, however, that the exact form of such implementing directive is within the discretion of the Secretary of Defense, and cannot be accurately forecasted. Finally, Congress recognized that the appointment grade of officers with the same amount of service may vary over time as the timing of active duty promotion to the relevant grade may fluctuate based on the needs of the service.²⁷ In short, like DOPMA itself, DOPMA TCA provides only a skeleton; there is much flesh to be added.

C. Constructive Service Credit

DOPMA TCA expands the definition of the event which triggers crediting of constructive service upon original appointment²⁸ in the Reg-

ular Army. DOPMA provided, in 10 U.S.C. § 533,²⁹ only for such credit if an officer is *appointed in* an officer category requiring or using such advanced education or degree. DOPMA TCA adds provision for crediting officers who are "designated or assigned" to the relevant officer category.³⁰ A similar change was made to 10 U.S.C. § 3353³¹ governing constructive credit for Reserve officers. This change is of import for the Air Force, which does not appoint officers in special branches (Army) or staff corps (Navy), but designates RAF officers in the specialties.

A more significant change in the crediting of constructive service involves new language concerning the determination of the amount of credit to be awarded.³² It is now clear that Congress intends an individual to be credited with the "normal" amount of time required to complete advanced education or training, regardless of the actual time used by a particular individual. However, the language of the DOPMA TCA formula may result in some confusion.

...the Secretary concerned shall credit an officer with, but with not more than, the number of years of postsecondary education in excess of four that are required by a majority of institutions that award degrees in that professional field for completion of the advanced education or award of the advanced degree.³³

The ambiguity involves a factual question to be answered by personnel managers: Do institutions *require* "(a) number of years of postsecondary education", or do they merely re-

²³ *Supra* at note 21.

²⁴ H.R. Rep. No. 97-141, at 15.

²⁵ This assumes that officers are promoted to first lieutenant upon completion of eighteen months time-in-grade; see 10 U.S.C. 619(a)(1)(A), as added by Pub. L. 96-513, sec. 105.

²⁶ 10 U.S.C. § 619(a)(1)(B), as added by Pub. L. 96-513, sec. 105.

²⁷ *Supra*, at note 24.

²⁸ An "original appointment" is the most recent appointment which is neither a promotion nor a demotion. 10 U.S.C. § 101(35). Therefore, it is possible for an individual to receive more than one "original appointment" (e.g., registration and subsequent appointment).

²⁹ As added by Pub. L. 96-513, sec. 104(a).

³⁰ 10 U.S.C. § 533(b)(1)(A), (B), and (E), as added by Pub. L. 96-513, sec. 104(a), as amended by Pub. L. 97-22, sec. 3(c).

³¹ *Supra* at note 22.

³² Pub. L. 97-22, secs. 3(c)(1)(C) and 5(c)(2)(D); for a full discussion of the problem of computation under DOPMA, see Bent, *Supra* note 1, at 9.

³³ *Supra* at note 32.

quire, for example, completion of both an undergraduate degree and the course requirements for the professional degree (regardless of the actual time used to complete either requirement)? Fortunately, the statutory language is supplemented by specific examples in the accompanying sectional analysis.³⁴ Based upon a review of those examples, a fair interpretation of the DOPMA TCA would focus on the time used by students, in due course, to complete the required course of study. Therefore, in the case of a JAGC officer, the sectional analysis makes it clear that persons generally graduate from law school after seven years of postsecondary education, and, under the DOPMA TCA formula, a JAGC appointee should be credited with three years of constructive credit, even though he may have completed law school in two years and three months.³⁵

Yet another DOPMA TCA change to constructive service provisions³⁶ solves the DOPMA anomaly of an officer attending advanced education while in an active status or on active duty, but receiving less service credit than that allowed a civilian who completes the same course of study.³⁷ DOPMA TCA allows for awarding equalizing constructive credit in addition to the normal service credit which the officer would be allowed based on his commissioned status.³⁸

D. Savings Provision for Officers Selected for Appointment

DOPMA TCA adds a new savings provision which allows the Army to appoint, and order to active duty, persons in post baccalaureate programs in such grades as they would have been appointed, coincident with order to active duty, under regulations in effect on 12 Decem-

ber 1980.³⁹ In order to qualify, the person must, *before* 15 September 1981, either (1) have been selected for participation in a post-baccalaureate education program *leading to appointment as a commissioned officer*, or (2) have completed a postbaccalaureate program and have been *selected* for appointment as a commissioned officer. This provision allows the services to protect the pre-DOPMA expectations of individuals in such programs. The language of the statute seems to suggest that reserve officers participating in an "ROTC educational delay" program⁴⁰ might not be covered by this DOPMA TCA provision because they have already been appointed as officers. However, Congress intended that the term "appointment," in the context of this savings provision, would have a broader meaning than normal; a specific example in the sectional analysis clarifies that this provision applies to commissioned officers participating in such an ROTC educational delay program.⁴¹

III. Promotion

The major innovation of the DOPMA TCA concerning promotions is the amendment of provisions requiring Reserve membership on promotion boards.⁴² The question of appropriate Reserve representation under the present statute, 10 U.S.C. § 266, has been the subject of much litigation.⁴³ The changes made by DOPMA TCA are designed to increase the flexibility of the services in determining the extent of such representation. Congress intends DOPMA TCA to clarify that a fixed ratio of

³⁴ H.R. Rep. No. 97-141, at 9-11 and 16-17.

³⁵ *Id.* at 10.

³⁶ Pub. L. 97-22, secs. 3(c)(4) and 5(c)(4)(B).

³⁷ H.R. Rep. No. 97-141, at 10-11, provides examples of this problem.

³⁸ *Id.*, at 10-11 and 17.

³⁹ Pub. L. 97-22, at sec. 8(n); 12 December 1980 is significant as it is the DOPMA enactment date.

⁴⁰ AR 601-25 (1 April 1976, thru Change 2, 1 July 1978).

⁴¹ H.R. Rep. No. 97-141, at 26-27.

⁴² Pub. L. 97-22, secs. 2(c) and 4(a)(2) and (3).

⁴³ *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979); *Doyle and Adams v. United States*, 599 F.2d 984, *modified*, 609 F.2d 990 (Ct. Cl. 1979), *cert. denied* 48 U.S.L.W. 3785 (1980); and *Stewart v. United States*, 611 F.2d 1356 (Ct. Cl. 1979).

proportionality of Reserve board members to the number of reserve officers being considered is *not* required.⁴⁴ Additionally, DOPMA TCA excepts Regular Army selection boards from the requirement to have Reserve membership.⁴⁵

Other DOPMA TCA changes pertaining to promotion include: adding flexibility in membership requirements of promotion boards (competitive category representation, use of retired members, and service on consecutive boards, i.e., promotion and then continuation boards),⁴⁶ requiring that notice of promotion zones include only the names and dates of rank of the junior and senior officers in a particular zone rather than of all such officers;⁴⁷ authorizing the creation of a period, not longer than one year, during which an officer who has been newly placed on a active-duty list is ineligible for promotion;⁴⁸—eliminating the requirement that promotion to the grade of captain be confirmed by the Senate;⁴⁹ and clarifying procedures and grounds for delaying promotions.⁵⁰

IV. Retirement

The basic effort in DOPMA TCA concerning the retirement of officers is to improve the coverage of various transition provisions, and thereby more effectively protect the expectations of officers currently on active duty. The

best example of this concerns the anomaly of the Reserve "hip-pocket" commissioned grade. DOPMA imposes a requirement that officers must serve on active duty in a grade for a specified period in order to retire in that grade.⁵¹ However, under current law, it is possible for a Reserve commissioned officer to retire from active duty in a Reserve grade that is higher than any grade in which he has served on active duty.⁵² DOPMA TCA "grandfathers" this expectation for Reserve officers on active duty on 14 September 1981, who retire under 10 U.S.C. § 3911 in the grade held or for which selected on 14 September 1981,⁵³ eliminating the need for such officers to consider early retirement in order to avoid the adverse effect of DOPMA upon their retirement grade.

Other DOPMA TCA changes pertaining to retirement include: providing Secretarial authority to waive the DOPMA transition provision requirement that an officer must serve on active duty for two years in a grade above major in order to retire in that grade;⁵⁴ and "grandfathering" the fifty percent floor on retired pay of officers who are mandatorily retired from active duty due to age before they have completed 20 years of active Federal service.⁵⁵

V. Conclusion

From the foregoing discussion, it is apparent that DOPMA TCA is to DOPMA as filling pot-holes is to constructing an interstate highway. To the affected officers, their personnel managers, and the attorneys who advise both, careful scrutiny of DOPMA TCA is required to insure that erroneous personnel actions are avoided. This article has not exhaustively cov-

⁴⁴ H.R. Rep. No. 97-141, at 7-8.

⁴⁵ Pub. L. 97-22, sec. 2(c)(1); H.R. Rep. No. 97-141, at 7.

⁴⁶ Pub. L. 97-22, sec. 4(a); H.R. Rep. No. 97-141, at 11-12.

⁴⁷ Pub. L. 97-22, sec. 4(b); H.R. Rep. No. 97-141, at 12-13.

⁴⁸ Pub. L. 97-22, sec. 4(c); H.R. Rep. No. 97-141, at 13.

⁴⁹ Pub. L. 97-22, sec. 4(d)(2); H.R. Rep. No. 97-141, at 14.

⁵⁰ Pub. L. 97-22, sec. 4(d)(3); H.R. Rep. No. 97-141, at 14; see also the transition provision which "grandfathers" promotion delays in process on 15 September 1981 (P.L. 97-22, sec. 8(a) and (b); H.R. Rep. No. 97-141, at 21).

⁵¹ 10 U.S.C. § 1370(a) and (b), as added by Pub. L. 96-513, sec. 112.

⁵² Retirement pursuant to 10 U.S.C. § 3911 with retirement grade determined by 10 U.S.C. § 3961.

⁵³ Pub. L. 97-22, sec. 8(n).

⁵⁴ Pub. L. 97-22, sec. 8(m); H.R. Rep. No. 97-141, at 24-25.

⁵⁵ Pub. L. 97-22, sec. 8(1); H.R. Rep. No. 97-141, at 24.

ered all of the DOPMA TCA provisions; caution and thorough research should be the hallmark

of an attorney analyzing the effects of DOPMA and DOPMA TCA upon individual careers.

McCARTY v. McCARTY: The End or the Beginning?

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"Ex-Spouse Retired Pay Split Rejected by High Court, 6-3"¹

Since 1974 California and several other jurisdictions have treated military retirement benefits as a community asset subject to division at the time of marriage dissolution.² The United States Supreme Court in *McCarty v. McCarty*,³ rejected this approach and held that the doctrine of federal pre-emption precludes a state court from dividing military non-disability retirement pay pursuant to state community property laws.

Divorced military retirees and careerists and those pending divorce, perceive this decision as a definitive victory in the legal battle over re-

tention of military retirement benefits in the event of divorce.⁴ This victory, however, may be illusory. An analysis of the majority opinion in *McCarty* and its applicability to already adjudicated divorce actions reveals that the decision raises more questions than it answers. Indeed, the Supreme Court's decision in *McCarty* appears to be a victory for servicemembers in the conflict over the division of military retirement benefits in divorce actions. However, there are several legal and political battles to be fought before the war over this issue will be concluded.

Case History

Richard John McCarty married Patricia Ann McCarty in Oregon while he was in medical school. Later he entered the Army, completed his medical studies, and made the Army his career. In the course of his military career, the McCartys were stationed in several states, including two assignments in California. During his last assignment in California, Dr. McCarty, who had attained the rank of Colonel, was the chief cardiologist at the Letterman General Army Hospital in San Francisco, California.

*JAGC, USAR. Commissioner of the Superior Court, Los Angeles County, California. A.B., 1957, J.D. 1959, Wayne University, Detroit; LL.M., 1964, Harvard University.

¹ The Army Times, July 6, 1981, at 2, col. 1.

² California: *In re Marriage of Milhan*, 27 Cal. 3d 765 (1980); *In re Marriage of Fithian*, 10 Cal. 3d 592 (1974), *cert. denied*, 491 U.S. 976. Idaho: *Ramsey v. Ramsey*, 535 P.2d 53 (Idaho Sup. Ct. 1975). Louisiana: *Moon v. Moon*, 345 So. 2d 168 (Ct. App. 1977). Washington: *Morris v. Morris*, 419 P.2d 129 (Wash. Sup. Ct. 1975). Arizona: *Czarnecki v. Czarnecki*, 123 Ariz. 466, 600 P.2d 1098 (1979). New Mexico: *Stephens v. Stephens*, 595 P.2d 1196 (N.M. Sup. Ct. 1979). Texas: *Busby v. Busby*, 457 S.W.2d 551 (Texas 1970). Cf. *Cose v. Cose*, 582 P.2d 1230 (Alaska 1979).

³ — U.S. —, 49 U.S.L.W. 4850 (1981).

⁴ The Army Times, July 13, 1981, at 18, col. 8 ("Hundreds of military retirees are expected to flood civil courts in several states with motions to amend their divorce settlements in the wake of the Supreme Court's landmark decision in *McCarty v. McCarty*").

After 19 years of marriage, 18 of which were in Army active duty, Colonel McCarty initiated marriage dissolution proceedings in the California Superior Court. Custody of the parties' three minor children was awarded to the wife. The trial court found and the Court of Appeals affirmed that the parties possessed a community or quasi-community property interest in the military longevity retirement pension expectation.⁵ On the basis of the California Supreme Court's decision rendered in the case *In re Fithian*,⁶ the trial court awarded the wife a share equal to 45% of any pension receipts.⁷ Certiorari was denied by the Supreme Court of California. The United States Supreme Court reversed the judgment as affirmed by the California Court of Appeals and returned the

case to the Appeals Court "for further proceedings, not inconsistent with this opinion."⁸

The Majority Opinion

In *McCarty*, the majority opinion, written by Justice Blackman, employs a curious analytical approach. Approximately 40% of the opinion is devoted to discussing the nature of Colonel McCarty's pension rights, giving what appears to be answers, but resolving none of the issues raised. The issues are simple. Is Colonel McCarty's retirement benefit a property right or not?⁹ If it is some form of a property right, then the United States Constitution affirms that California's law governs.¹⁰ As a form of property, it is the right of the states to characterize it as community property in a domestic relationship.¹¹

Justice Blackman, citing the Supreme Court's century-old decision in *United States v. Tyler*,¹² seems to conclude that military retirement monies constitute current compensation for current reduced services and are not deferred compensation for past performed services. The majority reasons that a retired military member remains a member of the Army¹³ who is subject to the Uniform Code of Military Justice,¹⁴ and subject to recall to active duty.¹⁵ After discussing the nature of retirement benefits and alluding to the Supreme Court's prior characterization of such retirement as current pay for current work in *Tyler*,¹⁶ the majority suddenly shifts gears and avoids this issue by

⁵ *McCarty v. McCarty*, ___ U.S. ___, 49 U.S.L.W. 4850, 4852 (1981).

¹⁰ 10 Cal. 3d 592, 517 P.2d 449 (1974), *cert. denied*, 419 U.S. 825 (1974).

Community property has been defined as "all property and *pecuniary rights* obtained by or in the name of either spouse after marriage, *by toil, talent, thrift, industry* or other productive faculty. . . ." 41 C.J.S. 999 (emphasis added). The community property system and rights are of ancient origin in California coming to the state from the Spanish Civil Law heritage. *Smith v. Smith*, 12 Cal. 217, 224 (1859). Clearly in California choices in action, *Nanny v. H.E. Pague Distillery*, 56 Cal. App. 2d 817, 133 P.2d 686 (1943), or rights to obligations, "products of labor or skill," and good will constitute property. Cal. Civ. Code § 655 (West). If such property is acquired during marriage, it is community property or quasi-community property and thus upon dissolution it must be equally divided between the spouses. *Id.* § 5110.

The California Supreme Court in *Fithian* took little effort to find that a military longevity retirement pension is the result of industry and services performed by the community and thus an asset that rests upon the military member's legal entitlement thereto. The *Fithian* court took great pains to limit its holding to classifying the pension rights as community property subject to "division" by the trial court, but it did not attempt to attach the Federal Treasury nor even make any demands on the Federal Authorities. 10 Cal. 3d 592, 603, 517 P.2d 460 (1974), *cert. denied*, 419 U.S. 825 (1974).

⁷ *McCarty v. McCarty*, ___ U.S. ___, 49 U.S.L.W. 4850, 4852 (1981).

⁸ *Id.* at 4857.

⁹ Cal. Civ. Code §§ 663-665 (West).

¹⁰ U.S. Const. amend X.

¹¹ *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

¹² 105 U.S. 244 (1881).

¹³ ___ U.S. ___, 49 U.S.L.W. 4850, 4853 (1981).

¹⁴ *Id.* See 10 U.S.C. § 802(4) (1976).

¹⁵ Pub. L. No. 96-513, § 106, 94 Stat. 2868 (1980).

¹⁶ *United States v. Tyler*, 105 U.S. 244 (1881).

basing its decision on different grounds, namely that of federal pre-emption.¹⁷

Although the Court could not find an express federal provision which pre-empted state law concerning the division of military pensions, the majority perceived a Congressional intent to threat military pay as a "personal entitlement" of the military member which should actually reach the hands of the retired military member.¹⁸ The majority predicated this perception of Congressional intent on the absence of any specific entitlement to retired pay for the retiree's spouse in the military retirement statutory scheme, and the language, structure, and history of the statutes.¹⁹ The majority concluded that the community property right of a former spouse conflicts with the servicemember's right to receive his "personal entitlement" under the federal military retirement statutes.²⁰ The majority further determined that this conflict "threatens grave harm to 'clear and substantial' federal interests"²¹ because it has the potential to frustrate the Congressional objective of providing for retired servicemembers and to disrupt military personnel management.²²

¹⁷ After considerable discussion of the characterization of military retirement pay as reduced present income or deferred compensation, the majority states:

Having said all this, we need not decide today whether federal law prohibits a State from characterizing retired pay as deferred compensation, since we agree with appellant's alternative argument that the application of community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation.

___ U.S. ___, 49 U.S.L.W. 4850, 4853 (1981).

¹⁸ ___ U.S. ___, 49 U.S.L.W. 4850, 4853-54 (1981).

¹⁹ *Id.*

²⁰ ___ U.S. ___, 49 U.S.L.W. 4850, 4855 (1981).

²¹ ___ U.S. ___, 49 U.S.L.W. 4850, 4856 (1981).

²² *Id.*

The Dissent

Justice Rehnquist, in his dissenting opinion,²³ argues that there is no such clear and compelling Congressional intent to usurp and override the rights of the states to determine the nature of marital property. Justice Rehnquist contends that the majority instead relies on cases dealing with analogous statutes, i.e., Natural Life Insurance Act or Railroad Retirement Act. The dissent notes that the Court's earlier reasoning in *Hisquierdo* and the majority's reliance on it in the *McCarty* case demonstrates the illusive nature of judicially perceived legislative intent. In *Hisquierdo*²⁴, the Supreme Court examined the Railroad Retirement Act and found Congressional pre-emption of California's community property law as applied to a federal railroad worker's pension upon divorce. The Court's finding of federal pre-emption was premised on the fact that Congress, in enacting the railroad retirement law, provided for a limited community right in the railroad pension. Congress, having spoken in a limited way, was perceived to intend that no other community rights were to be asserted therein by the states.²⁵ Now in *McCarty*, Congressional silence is perceived as a clear mandate to pre-empt California's community property laws and supersedes the ninth and tenth amendments of the U.S. Constitution.

The Effect

What are the practical effects of the *McCarty* case? What did the Court really do? What does it mean to divorced retirees and active duty servicemembers, and those pending divorce? If the majority opinion's extensive discussions concerning the denial of any attributes of property to military retirement benefits is truly gratuitous *dicta*, then state courts can continue to consider military pensions at least as a valuable equivalent to community proper-

²³ ___ U.S. ___, 49 U.S.L.W. 4850, 4857 (1981).

²⁴ 439 U.S. 572 (1979).

²⁵ *Id.*

ty. If so, it appears that trial courts can award the nonmilitary spouse exclusive rights to other assets, equal in value to the pension rights. If such a compensating asset award as part of the marital asset division frustrates the perceived Congressional intent, then the majority opinion appears to take without compensation pecuniary rights and expectancies from the non-military spouse who may have labored for a minimum of 20 years. The majority, no doubt, felt it escaped this problem and the issues of the ninth and tenth amendments to the U.S. Constitution by deciding the case on the basis of federal pre-emption.²⁶ At best, the Court has created the opportunity for additional litigation of this issue.

It appears that *McCarty* does not affect the ability of state courts to take into consideration the retired military member's pension benefits in setting the amount of spousal support the non-military member may be entitled to receive. A possible hardship may be created for the spouse of a divorced military member in a state such as Texas²⁷ where alimony is not recognized. In Texas, if the community has no other assets and no other income or separate property available, the non-military spouse may be left totally without funds for maintenance. However, the military retiree would retain his or her entire retirement pension.

The greatest controversy is created for parties who have divorced after *Fithian* and before *McCarty*. During the approximate seven year period since *certiorari* had been denied in *Fithian*, thousands of dissolution cases involving military personnel have been decided and rights determined. The majority opinion neither limits its decision to prospective application, nor provides for retroactive application. Since *McCarty*, the question arises whether a military retiree, whose divorce decree divided the pension between the spouses, can now unilaterally stop payments to the former spouse.

²⁶ See note 17 *supra*.

²⁷ *Bond v. Bond*, 41 Tex. Civ. App. 129, 90 S.W. 1128 (1906); *McElreath v. McElreath*, 162 Tex. 190, 345 S.W.2d 722 (1961).

It can be argued that the dissolution decree wherein the retirement benefits were divided between the parties became final and is *res adjudicata*. Yet, if the retiree simply refuses to pay to the former spouse his or her share of the pension as called for under the decree, will the state court be willing to invoke its contempt powers to enforce a decree that the U.S. Supreme Court would deny enforcement if it were being litigated presently? State courts most likely will not permit retirees to terminate sending their retirement pay without first obtaining some form of relief from the original judgment. However, the retiree can attempt to frustrate a trial court's exercise of its contempt power by filing for a *Writ of Prohibition*²⁸ from the state appellate court, if the state recognizes this writ, or by filing for a *Writ of Habeas Corpus*,²⁹ if incarcerated.

It is a widely accepted policy of state courts to foster amicable resolution of the issues by the parties with the aid of their counsel. This frequently reduces the trauma level of marriage dissolution which benefits the parties in adjusting to post dissolution life. As part of the settlement process, often the parties enter into a property settlement agreement whereby assets are exchanged and divided. Thus, if the military retiree had "given" to the spouse the full pension and in exchange received complete title to an equivalent value of other assets, it is possible that a retiree can refuse to pay over his pension, relying on *McCarty*, and attempt to refuse to give back any share of the assets received, relying on *res adjudicata*.

A comparable problem arises where an ex-spouse of a servicemember has either voluntarily waived rights to claim spousal support in re-

²⁸ An extraordinary writ issued by a superior court to an inferior court, prohibiting it from going beyond its legitimate powers. It is only issued in cases of extreme necessity where the matter cannot be redressed by ordinary proceedings at law, in equity, or by appeal. *Black's Law Dictionary* 1377 (Rev. 4th ed. 1968).

²⁹ This is the well known remedy for deliverance from illegal confinement. *Black's Law Dictionary* 837 (Rev. 4th ed. 1968).

liance on the right to receive his or her share of the military pension, or the trial court itself terminated permanently all claims to spousal support relying on such future pension. If such decrees are final, there is now little likelihood that the spousal support can be reactivated prospectively to compensate the non-military spouse for the loss of the pension rights *McCarty* occasioned.

In some cases it may be possible to relitigate a final decree and attempt to invoke *McCarty* or mitigate its retroactive effects. The common law *Writ of Error Coram Nobis*³⁰ was intended to allow the court that issued a decree based on an error of fact, to remedy the error. However, some states have abolished this common law writ.³¹ Besides, would such a writ even apply here since prior reliance on *Fithian* may not be regarded as an error of fact in these cases.

The availability of relief from a final judgment for reason of judicial mistake may depend on whether the state concerned has enacted a procedural rule analogous to Rule 60(b)(1) of the Federal Rules of Civil Procedure, which allows for relief from final judgment for "mistake ... in obtaining the judgment."³² The majority

of states affected by *McCarty* have enacted this rule.³³ However, motions brought under this rule must be brought within a limited time after final judgment.³⁴

Several states also have adopted a rule equivalent to Federal Civil Rule 60(b)(6), which provides for relief from final judgment for "[a]ny other reason justifying relief from the operation of the judgment."³⁵ Few states have placed a specific time restriction for filing a motion for relief under this rule.³⁶ However, this motion must be made within a reasonable time. Reliance on Rule 60(b) may provide the best method for reopening an adjudicated divorce on the basis of *McCarty*.

The trial court in *McCarty* retained jurisdiction to compute the percentage of the pension being allocated to the wife when and if the military spouse retired.³⁷ In view of *McCarty*, those servicemembers who are divorced, but not retired, and have a decree which divided the pension rights, but reserved jurisdiction as

the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

For a discussion on whether judicial error of law constitutes a "mistake" under this rule, see 16 *Tulsa L.J.* 347 (1980).

³³ California: *Calif. Civ. Code* § 473 (West). Arizona: *Ariz. Civ. R.* 60(b). Washington: *Wash. Civ. R.* 606(b). Montana: *Mont. Civ. R.* 60(b). Idaho: *Idaho Civ. R.* 60(b). Michigan: *Mich. Gen. Ct. R.* 529. New Jersey: *N.J. Civ. R.* 4:50-1.

³⁴ See note 32 *supra*. The Federal Rule 60(b)(1) requires that the motion be filed within one year of the final judgment. Washington, Michigan, and New Jersey also impose a one year limit. California, Idaho, and Arizona have a six month limitation, while Montana has a sixty day restriction.

³⁵ See note 32 *supra*. All of the states enumerated in note 33 *supra* have enacted a rule similar to Federal Rule 60(b)(6).

³⁶ Idaho is a notable exception since it is a community property state. A motion for relief predicated on the general relief provision of Idaho Civil Rule 60(b)(6) must be made within six months after the judgment.

³⁷ — U.S. —, 49 U.S.L.W. 4850, 4852 (1981).

³⁰ The purpose of this writ is to correct a judgment in the same court in which it was rendered, on the ground of error of fact, which, if known, would have prevented the judgment. *Black's Law Dictionary* 1785 (Rev. 4th ed. 1968).

³¹ For example, the *Writ of Coram Nobis* has been specifically abolished in Washington. *Wash. Civ. R.* 60(d).

³² Rule 60(b) states:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of

to the pension, the servicemember can assert that finality has not attached and move to modify the decree based on *McCarty*. Whether the Court retained sufficient jurisdiction to modify the entire property award is left to conjecture. The former spouse, however, can move to modify upward an already adjudicated award of spousal or child support in lieu of the loss of a percentage of the military pension on the basis of changed circumstances.³⁸

The question of whether the former spouse would be allowed to reopen if support was waived or judicially terminated in the earlier decree is also speculative. Traditional rules of *res adjudicata*, based on the desired policy of finality of judgments would hold against allowing relitigation of resolved issues. Yet, faced with the hardships generated by a retroactive application of *McCarty*, state courts will be tempted to come to the rescue. Perhaps the state courts will be creative and allow these final judgments to be reopened by analogy to the doctrine of failure of consideration in contracts. Perhaps a newly enunciated concept of interdependent elements of property division and support rights is possible. The danger of such approach is the creation of bad law which will return to create difficulties in unforeseen ways in the future.

Reserve Retirement Benefits

The majority opinion in *McCarty* specifically excluded from its consideration the issue of military reserve retirement pay and whether it is subject to marital property division at the time of marriage dissolution.³⁹ Yet there are striking similarities between reserve and active duty military retirement benefits. A major difference is the date payments begin. Colonel

McCarty, as a retired active duty military member, was eligible to receive retired pay immediately upon completion of his 20 years minimum service. A reservist must complete not only a minimum of 20 years qualified reserve service but also attain age 60.⁴⁰ However, once either the reservist or active duty person begins to receive retirement pay, the benefits are similar. These include medical and dental benefits for the retired member,⁴¹ and medical benefits for the retired member's spouse and dependents.⁴² The retired reservist is also eligible to elect an annuity for the surviving spouse and dependent children similar to active duty retirees.⁴³

Congress has provided the reservist an opportunity to know with certainty that he has completed the required 20 years of service for requirement qualification purposes. The appropriate Secretary must notify the reservist within one year of completion of the 20 years for retirement purposes.⁴⁴ Once such a letter is issued, entitlement to benefits cannot be defeated due to error, miscalculation, misinformation or administrative error.⁴⁵

A reserve officer upon completing the minimum 20 years of qualified service for retirement purposes may elect to leave active status by either transferring to the retired reserves or accepting discharge. Either of these elections will allow the reservist to receive retirement pay upon reaching age 60.⁴⁶ Yet, if the reservist elects to transfer to the retired reserves he or she would be subject to recall to active duty upon the necessary declaration by Congress.⁴⁷ Applying the majority's reasoning

³⁸ See, e.g., *Covert v. Covert*, 48 Misc. 2d 386, 264 N.Y.S.2d 820 (1965).

³⁹ "Under current law, there are three basic forms of military retirement: nondisability retirement; disability retirement; and reserve retirement. . . . For our present purposes, only the first of these forms is relevant." ____ U.S. ____, 49 U.S.L.W. 4850 (1981) (citation omitted).

⁴⁰ 10 U.S.C. § 1331 (1976).

⁴¹ *Id.* § 1074.

⁴² 10 U.S.C. § 1076 (Supp. III 1979).

⁴³ 10 U.S.C. §§ 1431 & 1447 (1976 & Supp. III 1979).

⁴⁴ 10 U.S.C. § 1331(d) (Supp. III 1979).

⁴⁵ 10 U.S.C. § 1406 (1976).

⁴⁶ *Id.* § 1331(a) (1976).

⁴⁷ *Id.* §§ 672 & 675.

in *McCarty*, it would appear that a reservist electing retired reserve status may be considered as generating reduced current pay for reduced current services, whereas electing discharge may generate a divisible guaranteed annuity deferred in receipt only until age 60. Such would lead to an anomaly if the reservist could defeat the spouse's claim to a community share of the retirement pay by merely electing to transfer to the retired reserve and not accept discharge.

Conclusion

The majority opinion in *McCarty* serves to raise more issues than it resolves. If the majority's intent was to clearly declare the principle of exclusive Congressional power over military retirement pay, it did so by a circuitous route. Whether this decision represents a victory for divorced retirees and servicemembers depends on their individual situations. Clearly those individuals who obtain a divorce after *McCarty* will be entitled to retain their entire military pension. However, they most likely will be required to pay higher spousal support and/or relinquish greater portions of other assets.

The fate of military retirees with final decrees depends on their ability to reopen the ac-

tion under the procedural rules of their respective jurisdictions. The same procedural rules will govern the success of already divorced active duty personnel. However, active duty servicemembers may have a foot in the jurisdictional door where the court has retained jurisdiction to compute the percentage of pension allocation until retirement. It is apparent that extensive litigation can be expected in attempts by military personnel, active and retired, or their former spouses, to clarify the meaning of *McCarty*. Additional uncertainty also has been generated and additional litigation can be expected to determine the rights of spouses to a share of a retired reservist's pension.

Resolution of the problems raised by the *McCarty* decision will not be left to the exclusive domain of the courts. Several bills have been introduced to provide military spouses with a statutory right to a share of military retirement benefits in the event of divorce.

Clearly, *McCarty* is not the great panacea for the pension ills of all divorced military personnel. From the viewpoint the divorced military personnel, active and retired, it can best be said of *McCarty* that the battle was won, but the war will continue.

A Matter of Record

Notes from Government Appellate Division, USALSA

1. Stipulations of Fact

A stipulation of fact serves two useful purposes during a guilty plea case. If allowed by the pretrial agreement a stipulation can be used to provide a factual basis for the plea. Second, the stipulation provides evidence which can be used to determine an appropriate sentence. Current case law holds that an accused's responses during the plea inquiry are not evidence and may not be used as the basis for a sentencing argument. In several recent cases the trial counsel failed to utilize pretrial agreement provisions requiring the accused to enter into a stipulation of fact with the trial

counsel. Thus, on appeal there is little or no evidence in the record which can be used to determine whether the sentence approved is appropriate. Trial counsel should fully utilize the stipulations of fact in guilty plea cases.

2. Pretrial Motions

Trial counsel should not place all of their eggs in one basket when litigating pretrial motions. If an alternative ground exists for the admission of evidence counsel should advance both grounds and support each theory with sufficient evidence. Military judges, like the rest of us, have been known to err. If the alterna-

tive theory has been adequately developed, the appellate courts may be able to find that the erroneous ruling was harmless because of the second theory advanced.

3. Post-trial Actions

Post-trial acts or omissions can effect the appellate outcome of a case just as trial or pretrial acts or omissions can. While the trial counsel may no longer play an active role in the case after trial, he should continue to monitor the case until action is taken. In addition to insuring that the proper defense counsel is served with the review, trial counsel should insure that the accused is confined at the desired location.

Recently an accused, sentenced to a discharge and six months confinement, was sent to the Disciplinary Barracks. After serving his sentence to confinement he went on excess leave. Even though there was no pretrial agreement, the convening authority intended

to suspend the discharge and have the accused serve his sentence at the Retraining Brigade. Since the confinement officials were not informed of the intended actions, they assumed that the confinement order was in error when it directed that the accused be sent to the Retraining Brigade. This error was compounded when the promulgating order was sent to the Retraining Brigade because the staff judge advocate assumed that the directions in the confinement order had been followed.

If confinement officials had been advised of the contemplated action when the accused was returned to confinement after trial, the accused would have been sent to the proper location. Further, if the staff judge advocate had determined where the accused was prior to mailing the promulgating order, the accused would not have to be recalled from excess leave to report to the Retraining Brigade for retraining after completely serving his sentence to confinement.

Judiciary Notes

US Army Legal Services Agency

Digests—Article 69, UCMJ, Applications

In *Dombroski*, SUMCM 1981/4965, the accused was convicted of disrespect towards a superior noncommissioned officer, in violation of Article 91, UCMJ. The victim was a specialist four, then acting as a corporal. Alleged disrespect towards an acting noncommissioned officer may not be properly charged as a violation

of Article 91. See *US v. Sutton*, 23 USCMA 231, 49 CMR 248 (1974). In the instant case, the evidence was sufficient to uphold a conviction of the lesser included offense of using provoking words and gestures, in violation of Article 117, UCMJ. The findings were modified to approve only a finding of guilty of the lesser offense; however, a reduction of the sentence was not warranted.

Criminal Law News

Recent Messages

a. *Edwards v. Arizona*

031400ZJUN81

DAJA-CL 1981/8296

FOR SJA.

SUBJECT: U.S. Supreme Court Decision,
Edwards v. Arizona

1. In *Edwards v. Arizona*, 49 U.S.L.W. 4496 (18 May 81), the US Supreme Court held that once a suspect invokes the right to have counsel present under *Miranda v. Arizona*, 384 U.S. 436 (1966), "... a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such

as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." *Id.*, at 4498.

b. Grants of Immunity

301700ZJUN81
DAJA-CL 1981/8615
FOR SJA
SUBJECT: Grants of Immunity

1. Pending DOD Guidance, the following policies concerning negotiations and grants of immunity will be followed.

2. In any case in which the interests of the Department of Justice under the DOD-DOJ memorandum of understanding relating to the investigation and prosecution of crimes over which the two departments have concurrent jurisdiction, 19 July 1955, may be involved, grants of immunity will be coordinated with the Department of Justice through the medium of the staff judge advocate and the local United States Attorney concerned, or through The Judge Advocate General and the Department of Justice in any case in which a specific United States Attorney cannot be identified or if agreement with him cannot be attained with respect to the particular grant of immunity. See chapter 7, AR 27-10 (3 February 1969).

3. In any case in which offenses against the national security (e.g., espionage, subversion, sabotage, spying and aiding the enemy) of the United States are involved, no negotiations relating to a grant of immunity will be conducted, nor will a grant of immunity be given without prior coordination with The Judge Advocate General and the Assistant Chief of Staff for Intelligence, Department of the Army. Requests for coordination will be forwarded to DAJA-CL, Washington, DC 20310.

c. United States v. Robinson

231430ZJUN81
DAJA-CL 1981/8505
FOR SJA.
SUBJECT: USMA Decision, *US v. Robinson*

1. In *US v. Robinson*, 11 MJ 218 (CMA 1981) CMA held that the accused was deprived of his post-trial rights under *US v. Goode*, 1 MJ 3 (CMA 1975), where the staff judge advocate's review was not served upon the accused's civilian counsel, who was his only lawyer, and where the civilian counsel had never asked the originally detailed military counsel to prepare the review.

2. The court suggested the following procedures which should be followed to insure that the *Goode* requirements are met: "First, in a case where more than one defense counsel has appeared the military judge should seek at the conclusion of the trial to establish on the record which lawyer will have the primary responsibility for preparing the *Goode* response. Secondly, where a civilian counsel is involved, it is appropriate for the judge to discuss with him in open court the post-trial responsibilities to which he will be subject under *Goode* unless specifically released therefrom by the accused. Third, if more than one military defense counsel appears at trial, the staff judge advocate—if the allocation of post-trial responsibilities is not already manifest from the record—should determine which counsel is to prepare the *Goode* response and should reflect in his review or otherwise the basis for service on any attorney other than the appointed defense counsel. If, for whatever reason, the staff judge advocate cannot determine which defense counsel is to be chiefly responsible for post-trial defense functions, then he should serve a copy of his review on all defense counsel." *Robinson*, *supra* at 224.

3. Trial counsel should be advised that they should request that military judges make the appropriate inquiries on the record in cases in which the judges have not done so *sua sponte*.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Article 138 Complaint)—Commander has Authority to Nonconcur in MOS Reclassification Board Recommendation. DAJA-AL 1981/2250, 13 March 1981.

A military policeman stationed in Germany allegedly took a German banner during a local celebration. His battalion commander, the respondent to the Article 138 complaint, recommended the soldier be reclassified from the military police MOS because his conduct was unacceptable for a military policeman. The battalion commander appointed a reclassification board that recommended against reclassification because of the soldier's otherwise perfect record. The battalion commander, however, nonconcurred and forwarded the action to the reclassification authority (the GCMCA) recommending reclassification. The reclassification authority reclassified the soldier out of the military police MOS.

The soldier requested redress of the battalion commander alleging the wrong as the battalion commander's nonconcurrence in the reclassification board's recommendation and asked for revocation of the nonconcurrence and restoration of all rights. The battalion commander denied redress and the soldier complained under Article 138 to the GCMCA alleging the same wrong and requesting the same redress.

GCMCA, citing paragraph 1-5b(3), AR 27-14, declined to process the complaint stating the actions of a reclassification board were not a proper subject for Article 138 complaints. The complainant requested reconsideration, citing the policy permitting recruiters reclassified from the recruiter MOS to request redress by Article 138. The GCMCA considered the request for redress on its merits and

denied redress, finding that the respondent commander acted within his authority to make his recommendation of nonconcurrence to the board's recommendation.

The TJAG affirmed the GCMCA's determination that the respondent's action was within his legitimate authority. In reaching this determination, TJAG noted that MOS reclassification board action is not ordinarily a proper subject for Article 138 complaints. Soldiers reclassified from the recruiter MOS were permitted to file Article 138 complaints because they did not have a right to a board hearing before such reclassification and therefore Article 138 was appropriate. A normal MOS reclassification under AR 600-200 requires a board hearing before reclassification, making that a more appropriate channel for redress.

In discussing the commander's right to nonconcur in the recommendation of the reclassification board, TJAG stated that para. 2-40, AR 600-200, gave the reclassification board appointing authority certain options regarding the reclassification board recommendation. To read para 2-40a, AR 600-200, to mean that the appointing authority is required to approve a reclassification board recommendation if that board recommends retention is a very restricted reading of the regulation. A more reasonable reading of para. 2-40 is that the appointing authority has available to him all the alternatives of this paragraph. To read the provision narrowly would mean the classification board would not make recommendations but rather findings and determinations binding on the commander. This was not the intent of the proponent of the regulation. The appointing authority has the full range of options, including forwarding the matter to the reclassification authority with recommendations. He was not required to approve the recommendation of retention of MOS.

Legal Assistance Items

*Major Joel R. Alvarey, Major Walter B. Huffman, Major John F. Joyce, Captain Timothy J. Grendell, and Captain Harlan M. Heffelfinger
Administrative and Civil Law Division, TJAGSA*

1. Texas State Jury Duty and Active Duty Military Personnel.

The Attorney General of Texas, in Opinion No. MW-50, dated 8 October 1980, concluded that an active duty member of the U.S. Armed Forces, acting under federal law and pursuant to the valid orders of a superior, may not be compelled to engage in jury service by the State of Texas.

2. LAMP Martindale-Hubbell Project.

The Legal Assistance for Military Personnel (LAMP) Committee of the ABA has available copies of one-year-old sets of the Martindale-Hubbell Directory for distribution to legal assistance offices upon request. Any legal assistance officer who does not have access to the Martindale-Hubbell Directory and who desires a set should contact Contance E. Berg, ABA, 1155 E. 60th Street, Chicago, Illinois 60637.

3. Legal Assistance Awards.

The Young Lawyer's Division of the American Bar Association has awarded a "Special Recognition Award" to Captain Charles W. Hemingway, Post Judge Advocate, Pine Bluff Arsenal, for the "Military Dependents Support Assistance Program" he initiated at his installation. Captain Hemingway marshalled the cooperation of state and county authorities and the local bar into a successful program, to insure that military dependents in the area receive adequate support from servicemembers on duty elsewhere. Captain Hemingway's receipt of this award represents the first time that this award was given to a single-person le-

gal office. Captain Hemingway's efforts on behalf of military dependents are to be highly commended. Additional information concerning Captain Hemingway's program can be obtained from the Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School, Charlottesville, VA 22904.

The Legal Assistance for Military Personnel (LAMP) Committee of the American Bar Association has announced that it has selected the 2d Armored Division Legal Assistance Office, Fort Hood, Texas, to receive the LAMP Legal Assistance Award for its delivery of legal assistance during REFORGER '80. The 2d Armored Division Legal Assistance Office, consisting of two attorneys and one clerk, provided on-site legal services to more than 8,000 deploying personnel and extended office services to their dependents during the six-week exercise. The LAMP award will be presented to a representative of the 2AD Staff Judge Advocate's Office at the Military Law Section's luncheon during the American Bar Association's annual convention in New Orleans in August.

4. Address Update

The Legal Assistance Branch is updating its list of legal assistance mailing addresses. The current list follows. Additions, deletions, or changes to the list should be sent to the Commandant, The Judge Advocate General's School, ATTN: Administrative & Civil Law Division (Legal Assistance Branch), Charlottesville, VA 22901.

ALABAMA

Staff Judge Advocate
HQ, US Army Military Police School
and Fort McClellan
ATTN: Legal Assistance
Fort McClellan, AL 36205

Staff Judge Advocate
HQ, US Army Aviation Center and
Fort Rucker
ATTN: Legal Assistance
Fort Rucker, AL 36362

Staff Judge Advocate
HQ, US Army Missile Readiness
Command
ATTN: Legal Assistance
Redstone Arsenal, AL 35809

ALASKA

Staff Judge Advocate
HQ 172d Infantry Brigade
ATTN: Legal Assistance
APO Seattle 98733

Staff Judge Advocate
HQ, 172d Infantry Brigade
ATTN: Legal Assistance
Fort Richardson, AK 99505

Staff Judge Advocate
HQ, 172d Infantry Brigade
ATTN: Legal Assistance
Fort Wainwright, AK 99703

ARIZONA

Staff Judge Advocate
HQ, Fort Huachuca
ATTN: Legal Assistance
Fort Huachuca, AZ 85613

Judge Advocate
HQ, Yuma Proving Ground
ATTN: Legal Assistance
Yuma, AZ 85364

ARKANSAS

Judge Advocate
HQ, Pine Bluff Arsenal
ATTN: Legal Assistance
Pine Bluff, AR 71611

CALIFORNIA

Judge Advocate
HQ, Sierra Army Depot
ATTN: Legal Assistance
Herlong, CA 96113

Staff Judge Advocate
HQ, Military Traffic Management
Center, Western Area
ATTN: Legal Assistance
Oakland Army Base
Oakland, CA 94626

Staff Judge Advocate
HQ, 7th Infantry Division and Fort
Ord
ATTN: Legal Assistance
Fort Ord, CA 93941

Staff Judge Advocate
Presidio of San Francisco
ATTN: Legal Assistance
San Francisco, CA 94129

Judge Advocate
HQ, Letterman Army Medical
Center
ATTN: Legal Assistance
San Francisco, CA 94129

Judge Advocate
HQ, US Army Support
Detachment, Fort MacArthur
ATTN: Legal Assistance
San Pedro, CA 90731

Staff Judge Advocate
HQ, National Training Center
ATTN: Legal Assistance
Fort Irwin, CA 92311

COLORADO

Staff Judge Advocate
HQ, 4th Infantry Division and Fort
Carson
ATTN: Legal Assistance
Fort Carson, CO 80913

Judge Advocate
HQ, Fitzsimmons Army Medical
Center
ATTN: Legal Assistance
Aurora, CO 80045

DISTRICT OF COLUMBIA

The Judge Advocate General
HQ, Department of the Army
ATTN: Legal Assistance
Washington, D.C. 20310

Staff Judge Advocate
HQ, US Army Military District of
Washington
Fort Leslie J. McNair
ATTN: Legal Assistance
Washington, D.C. 20319

Staff Judge Advocate
HQ, Walter Reed Army Medical
Center
ATTN: Legal Assistance
Washington, D.C. 20012

FLORIDA

Staff Judge Advocate
HQ, US Readiness Command
ATTN: Legal Assistance
MacDill AFB, FL 33608

GEORGIA

Staff Judge Advocate
HQ, US Army Infantry Center and
Fort Benning
ATTN: Legal Assistance
Fort Benning, GA 31905

Staff Judge Advocate
HQ, 24th Infantry Division (M) and
Fort Stewart
ATTN: Legal Assistance
Fort Stewart, GA 31314

Staff Judge Advocate
HQ, US Army Signal Center and
Fort Gordon
ATTN: Legal Assistance
Fort Gordon, GA 30905

Staff Judge Advocate
HQ, 24th Infantry Division (M) and
Fort Stewart
ATTN: Legal Assistance
Hunter Army Airfield, GA 31409

Judge Advocate
HQ, Fort McPherson
ATTN: Legal Assistance
Fort McPherson, GA 30330

HAWAII

Staff Judge Advocate
HQ, Army and Air Force Exchange
Service, Pacific
ATTN: Legal Assistance
919 Ala Moana
Honolulu, HI 96814

Staff Judge Advocate
U.S. Army Element, Pacific
ATTN: Legal Assistance
Pearl Harbor, HI 96860

Staff Judge Advocate
HQ, 25th Infantry Division
ATTN: Legal Assistance
Schofield Barracks, HI 96857

Judge Advocate
HQ, Tripler Army Medical Center
ATTN: Legal Assistance
Honolulu, HI 96859

Staff Judge Advocate
HQ, US Army Support Command,
Hawaii
ATTN: Legal Assistance
Fort Shafter, HI 96858

ILLINOIS

Staff Judge Advocate
HQ, Fort Sheridan
ATTN: Legal Assistance
Fort Sheridan, IL 60037

Staff Judge Advocate
HQ, US Army Recruiting Command
ATTN: Legal Assistance
Fort Sheridan, IL 60037

Judge Advocate
HQ, US Army Armament Material
Readiness Command
ATTN: Legal Assistance
Rock Island, IL 61299

INDIANA

Staff Judge Advocate
HQ, US Army Soldier Support Center
and Fort Benjamin Harrison
ATTN: Legal Assistance
Fort Benjamin Harrison, IN 46216

KANSAS

Staff Judge Advocate
HQ, US Army Combined Arms
Center and Fort Leavenworth
ATTN: Legal Assistance
Fort Leavenworth, KS 66027

Staff Judge Advocate
HQ, 1st Infantry Division and Fort
Riley
ATTN: Legal Assistance
Fort Riley, KS 66442

KENTUCKY

Staff Judge Advocate
HQ 101st Airmobile Division and
Fort Campbell
ATTN: Legal Assistance
Fort Campbell, KY 42223

Staff Judge Advocate
HQ, US Army Armor Center and
Fort Knox
ATTN: Legal Assistance
Fort Knox, KY 40121

LOUISIANA

Staff Judge Advocate
HQ, 5th Infantry Division and Fort
Polk
ATTN: Legal Assistance
Fort Polk, LA 71459

MARYLAND

Judge Advocate
HQ, US Army Intelligence and
Security Command, CONUS MI
GP
ATTN: Legal Assistance
Fort Meade, MD 20755

Judge Advocate
HQ, Electronic Research and
Development Command
ATTN: Legal Assistance
Adelphia, MD 20783

Staff Judge Advocate
HQ, US Army Test and Evaluation
Command
ATTN: Legal Assistance
Aberdeen Proving Ground, MD
2100

Judge Advocate
HQ, Fort Detrick
ATTN: Legal Assistance
Frederick, MD 21701

Staff Judge Advocate
HQ, Fort George G. Meade
ATTN: Legal Assistance
Fort George G. Meade, MD 20755

Judge Advocate
HQ, US Army Joint Support
Command
ATTN: Legal Assistance
Fort Ritchie, MD 21719

MASSACHUSETTS

Staff Judge Advocate
HQ, US Army Garrison, Fort
Devens
ATTN: Legal Assistance
Fort Devens, MA 01433

MICHIGAN

Judge Advocate
HQ, US Army Tank-Automotive
Center
Warren, MI 48090

MISSOURI

Staff Judge Advocate
HQ, US Army Training Center and
Fort Leonard Wood
ATTN: Legal Assistance
Fort Leonard Wood, MO 65473

Staff Judge Advocate
HQ, US Army Troop Support and
Aviation Material Readiness
Command
4300 Goodfellow Blvd
ATTN: Legal Assistance
St. Louis, MO 63120

NEW JERSEY

Staff Judge Advocate
HQ, US Army Training Center and
Fort Dix
ATTN: Legal Assistance
Fort Dix, NJ 08640

Staff Judge Advocate
HQ, US Army Communications and
Electronic Material Readiness
Command and Fort Monmouth
ATTN: Legal Assistance
Fort Monmouth, NJ 08803

Staff Judge Advocate
HQ, Military Ocean Terminal,
Pacific
ATTN: Legal Assistance
Bayonne, NJ 07002

NEW MEXICO

Staff Judge Advocate
HQ, White Sands Missile Range
ATTN: Legal Assistance
White Sands, NM 88002

NEW YORK

Staff Judge Advocate
United States Military Academy
ATTN: Legal Assistance
West Point, NY 10996

Judge Advocate
HQ, Stewart Field
ATTN: Legal Assistance
Newburgh, NY 12550

Judge Advocate
HQ, New York Area Command and
Fort Hamilton
ATTN: Legal Assistance
Brooklyn, NY 11252

Judge Advocate
HQ, U.S. Army Garrison, Fort
Drum
ATTN: Legal Assistance
Fort Drum, NY 13602

Judge Advocate
HQ, Seneca Army Depot
ATTN: Legal Assistance
Romulus, NY 14541

NORTH CAROLINA

Staff Judge Advocate
HQ, XVIII Airborne Corps and Fort
Bragg
ATTN: Legal Assistance
Fort Bragg, NC 28307

Staff Judge Advocate
HQ, 82d Airborne Division
ATTN: Legal Assistance
Fort Bragg, NC 28307

Judge Advocate
USAJFKCEN for Military
Assistance
ATTN: Legal Assistance
Fort Bragg, NC 28307

OKLAHOMA

Staff Judge Advocate
HQ, US Army Field Artillery Center
and Fort Sill
ATTN: Legal Assistance
Fort Sill, OK 73503

PENNSYLVANIA

Judge Advocate
HQ, US Army Garrison, Fort Indian
Town Gap
ATTN: Legal Assistance
Annville, PA 17003

Judge Advocate
HQ, Letterkenny Army Depot
ATTN: Legal Assistance
Chambersburg, PA 17201

Judge Advocate
HQ, Carlisle Barracks
ATTN: Legal Assistance
Carlisle Barracks, PA 17013

SOUTH CAROLINA

Staff Judge Advocate
 HQ, US Army Training Center and Fort Jackson
 ATTN: Legal Assistance
 Fort Jackson, SC 29207

TEXAS

Staff Judge Advocate
 HQ, US Army Air Defense Center
 and Fort Bliss
 ATTN: Legal Assistance
 Fort Bliss, TX 79916

Staff Judge Advocate
 HQ, 1st Cavalry Division
 ATTN: Legal Assistance
 Fort Hood, TX 76545

Staff Judge Advocate
 HQ, III Corps and Fort Hood
 ATTN: Legal Assistance
 Fort Hood, TX 76544

Staff Judge Advocate
 HQS, US Army Health Services
 Command
 ATTN: Legal Assistance
 Fort Sam Houston, TX 78234

Staff Judge Advocate
 HQ, 2d Armored Division
 ATTN: Legal Assistance
 Fort Hood, TX 76546

Staff Judge Advocate
 HQ, Fort Sam Houston
 ATTN: Legal Assistance
 Fort Sam Houston, TX 78234

Judge Advocate
 HQ, William Beaumont Army Medical Center
 ATTN: Legal Assistance
 El Paso, TX 79920

UTAH

Judge Advocate
 HQ, Dugway Proving Ground
 ATTN: Legal Assistance
 Dugway, UT 84022

VIRGINIA

Staff Judge Advocate
 HQ, US Army Intelligence and
 Security Command
 Arlington Hall Station
 ATTN: Legal Assistance
 Arlington, VA 22212

Staff Judge Advocate
 HQ, US Army Garrison, Arlington
 Hall Station
 ATTN: Legal Assistance
 Arlington, VA 22212

Staff Judge Advocate
 HQ, Military Traffic Management
 Command
 ATTN: Legal Assistance
 Washington, D.C. 20315

Judge Advocate
 HQ, Fort Monroe
 ATTN: Legal Assistance
 Fort Monroe, VA 23651

Staff Judge Advocate
 HQ, Fort Myer
 ATTN: Legal Assistance
 Fort Myer, VA 22211

Staff Judge ADvocate
 HQ, US Army Engineer Center and
 Fort Belvoir
 ATTN: Legal Assistance
 Fort Belvoir, VA 22060

Judge Advocate
 The Judge Advocate General's
 School, US Army
 ATTN: Legal Assistance
 Charlottesville, VA 22901

Staff Judge Advocate
 HQ, US Army Training and Doctrine
 Command
 ATTN: Legal Assistance
 Fort Monroe, VA 23651

Staff Judge Advocate
 HQ, US Army Material
 Development and Readiness
 Command
 5001 Eisenhower Avenue
 ATTN: Legal Assistance
 Alexandria, VA 22333

Staff Judge Advocate
 HQ, US Army Transportation
 Center and Fort Eustis
 ATTN: Legal Assistance
 Fort Eustis, VA 23604

Staff Judge Advocate
 HQ, USS Army Quartermaster
 Center and Fort Lee
 ATTN: Legal Assistance
 Fort Lee, VA 23801

Staff Judge Advocate
 HQ of the Commander in Chief,
 Atlantic Command
 ATTN: Legal Assistance
 Norfolk, VA 23511

Staff Judge Advocate
HQ, US Army Garrison, Vint Hill Farms Station
ATTN: Legal Assistance
Warrenton, VA 22186

WASHINGTON

Staff Judge Advocate
HQ, 9th Infantry Division and Fort
Lewis
ATTN: Legal Assistance
Fort Lewis, WA 98433

Judge Advocate
HQ, Madigan Army Medical Center
ATTN: Legal Assistance
Tacoma, WA 98431

WISCONSIN

Judge Advocate
HQ, Fort McCoy
ATTN: Legal Assistance
Sparta, WI 54656

BELGIUM

Judge Advocate
U.S. Army Claims Office
ATTN: Legal Assistance
APO New York 09667

Judge Advocate
HQ, NATO/SHAPE Support Group
(US)
ATTN: Legal Assistance
APO New York 09088

FRANCE

Judge Advocate
Defense Attache Office, Paris
ATTN: Legal Assistance
APO New York 09777

GERMANY

Staff Judge Advocate
HQ, 1st Armored Division
ATTN: Legal Assistance
APO New York 09326

Staff Judge Advocate
HQ, 3d Infantry Division
ATTN: Legal Assistance
APO New York 09330

Staff Judge Advocate
HQ, 8th Infantry Division
ATTN: Legal Assistance
APO New York 09034

Staff Judge Advocate
Defense Attache Office, Bonox
ATTN: Legal Assistance
APO New York 09777

Staff Judge Advocate
HQ, 32d Army Air Defense
Command
ATTN: Legal Assistance
APO New York 09175

Staff Judge Advocate
HQ, 3rd Infantry Division
ATTN: Legal Assistance
APO New York 09162

Staff Judge Advocate
HQ, 8th Infantry Division
ATTN: Legal Assistance
APO New York 09111

Staff Judge Advocate
HQ, U.S. Army, Berlin
ATTN: Legal Assistance
APO New York 09742

Staff Judge Advocate
HQ, US Army Support Group
Norddeutschland
ATTN: Legal Assistance
APO New York 09069

Staff Judge Advocate
HQ, 1st Armored Division
ATTN: Legal Assistance
APO New York 09066

Staff Judge Advocate
HQ, VII Corps
ATTN: Legal Assistance
APO New York 09178

Staff Judge Advocate
HQ, 1st Armored Division
ATTN: Legal Assistance
APO New York 09139

Staff Judge Advocate
HQ, 1st Infantry Division
ATTN: Legal Assistance
APO New York 09046

Staff Judge Advocate
HQ, 3d Armored Division
ATTN: Legal Assistance
APO New York 09077

Staff Judge Advocate
HQ, 3d Armored Division
ATTN: Legal Assistance
APO New York 09039

Staff Judge Advocate
HQ, V Corps
ATTN: Legal Assistance
APO New York 09079

Staff Judge Advocate
HQ, 2d Armored Division
ATTN: Legal Assistance
APO New York 09355

Staff Judge Advocate
HQ, 1st Infantry Division
ATTN: Legal Assistance
APO New York 09137

Staff Judge Advocate
HQ, U.S. Army Europe and 7th
Army
ATTN: Legal Assistance
APO New York 09403

Staff Judge Advocate
HQ, VII Corps
ATTN: Legal Assistance
APO New York 09176

Staff Judge Advocate
HQ, 21st Support Command
ATTN: Legal Assistance
APO New York 09360

Staff Judge Advocate
HQ, 21st Support Command
ATTN: Legal Assistance
APO New York 09166

Staff Judge Advocate
HQ, 1st Armored Division
ATTN: Legal Assistance
APO New York 09696

Judge Advocate
HQ 56th Field Artillery
ATTN: Legal Assistance
APO New York 09281

Staff Judge Advocate
HQ, VII Corps
ATTN: Legal Assistance
APO New York 09107

Judge Advocate
HQ, 5th Signal Command
ATTN: Legal Assistance
APO New York 09056

ITALY

Staff Judge Advocate
HQ, Armored Forces South
ATTN: Legal Assistance
APO New York 09524

Staff Judge Advocate
HQ, 3d Armored Division
ATTN: Legal Assistance
APO New York 09074

Staff Judge Advocate
HQ, 3d Armored Division
ATTN: Legal Assistance
APO New York 09091

Staff Judge Advocate
HQ, Seventh Army Training Center
ATTN: Legal Assistance
APO New York 09066

Staff Judge Advocate
HQ, 21st Support Command
ATTN: Legal Assistance
APO New York 09102

Staff Judge Advocate
HQ, 1st Armored Division
ATTN: Legal Assistance
APO New York 09140

Staff Judge Advocate
HQ, 3rd Infantry Division
ATTN: Legal Assistance
APO New York 09031

Staff Judge Advocate
HQ, VII Corps
ATTN: Legal Assistance
APO New York 09184

Staff Judge Advocate
HQ, 21st Support Command
ATTN: Legal Assistance
APO New York 09189

Staff Judge Advocate
HQ 3d Infantry Division
ATTN: Legal Assistance
APO New York 09701

Staff Judge Advocate
HQ, US European Command
ATTN: Legal Assistance
APO New York 09128

Staff Judge Advocate
HQ, 3d Infantry Division
ATTN: Legal Assistance
APO New York 09036

Staff Judge Advocate
HQ, 8th Support Command
ATTN: Legal Assistance
APO New York 09019

Staff Judge Advocate
HQ, V Corps
ATTN: Legal Assistance
APO New York 09146

Staff Judge Advocate
HQ, 3d Armored Division
ATTN: Legal Assistance
APO New York 09169

Staff Judge Advocate
HQ, 3d Armored Division
ATTN: Legal Assistance
APO New York 09165

Judge Advocate
HQ, 7th Medical Command
ATTN: Legal Assistance
APO New York 09102

Staff Judge Advocate
HQ, 21st Support Command
ATTN: Legal Assistance
APO New York 09325

Staff Judge Advocate
HQ, 8th Infantry Division
ATTN: Legal Assistance
APO New York 09185

Staff Judge Advocate
HQ, 1st Infantry Division
ATTN: Legal Assistance
APO New York 09035

Staff Judge Advocate
HQ, 1st Infantry Division
ATTN: Legal Assistance
APO New York 09281

Staff Judge Advocate
HQ, VII Corps
ATTN: Legal Assistance
APO New York 09154

Staff Judge Advocate
HQ, V Corps
ATTN: Legal Assistance
APO New York 09457

Staff Judge Advocate
HQ, US Army Southern European
Task Force
ATTN: Legal Assistance
APO New York 09168

JAPAN

Staff Judge Advocate
HQ, US Army Japan/IX Corps
ATTN: Legal Assistance
APO San Francisco 96633

KOREA

Staff Judge Advocate
HQ 2d Infantry Division
ATTN: Legal Assistance
APO San Francisco 96224

Staff Judge Advocate
HQ, US Army Garrison
ATTN: Legal Assistance
APO San Francisco 96271

Staff Judge Advocate
HQ, Combined Field Army
(ROK/US)
ATTN: Legal Assistance
APO San Francisco 96358

Judge Advocate
HQ, 38th Air Defense Brigade
ATTN: Legal Assistance
APO San Francisco 96570

Staff Judge Advocate
HQ, 19th Support Command
ATTN: Legal assistance
APO San Francisco 96212

Judge Advocate
HQ, US Army Garrison, Yongsan
ATTN: Legal Assistance
APO San Francisco 96301

KWAJELEIN

Judge Advocate
HQ, Ballistic Missile Defense Systems Command
ATTN: Legal Assistance
APO San Francisco 96555

NETHERLANDS

Judge Advocate
HQ, AFCENT Support Activity (US)
ATTN: Legal Assistance
APO New York 09011

OKINAWA

Staff Judge Advocate
HQ, US Army Garrison, Okinawa
ATTN: Legal Assistance
APO San Francisco 96331

PANAMA

Staff Judge Advocate
HQ, 193rd Infantry Brigade
ATTN: Legal Assistance
APO Miami 34004

Staff Judge Advocate
HQ, 193rd Infantry Brigade
ATTN: Legal Assistance
APO Miami 34005

PUERTO RICO

Judge Advocate
HQ, United States Army Garrison
Fort Buchanan, Puerto Rico
ATTN: Legal Assistance
APO Miami 34040

TURKEY

Judge Advocate
HQ, US Logistics Detachment Four
ATTN: Legal Assistance
APO New York 09133

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan



1. Assignment Procedures. Based on the many comments received regarding assignments in my April 1981 column, I have asked SFC Meehan to expand on his remarks in that article. Following are his added thoughts on the subject of enlisted assignments:

As previously mentioned, individual soldier assignments are generated by a requisition from a command. Requisitions are for specific grades and MOS and may include security clearance or language requirements. They also state the command's desired reporting month and year for the soldier detailed. Many, such as combat maneuver units, also include a requirement for male only fill. The vast majority of requisitions, however, are for fill to posts and the "general" overseas commands, i.e., 21st Replacement Battalion in Germany, or 15th AG Replacement Company at Ft. Hood, Texas. Ultimate units of assignment for these replacements are determined by the gaining command, not MILPERCEN. Perhaps the most challenging aspects of filling requisitions is the grade substitutability restrictions placed on assignment managers at MILPERCEN. Generally, an E5 71D requisition may only be filled by an E3, E4, E4(P), or E5. This system carries through all grades. We have recently received approval to place E5(P) 71D/E personnel against E5 requisitions due to our constant shortage of E5 71D/E coupled with the high cutoff scores for promotion to E6. Commanders in the field may also slot personnel one grade down or two grades up. MILPERCEN may only assign to current or higher grades without a specific case by case exception to policy. This system creates some heartburn with E5/6/7 who prefer a specific CONUS installation and in many cases could care less about the number of authorized vs. assigned for his or her grade. For now and the foreseeable future this situation will not improve, however. MILPERCEN

must have an E6 requisition for the command in order to assign an E6 there. Often we have a situation where soldiers are returning from an overseas assignment and there are no valid requisitions against which to apply them. This is particularly true with our overstrength E7 situation. These cases require assigning soldiers to overstrength installations by grade. In these cases the total fill level, the next lower and higher grades, and the soldier's desires are the determining factors.

2. SQT Update. I have learned after speaking with a number of our chief legal clerks regarding SQT testing, that they perceive we will equal or surpass last year's test results. This is a good indication that our training programs are really preparing our personnel.

The SQT Team from Fort Benjamin Harrison visited three installations, Fort Sill, Fort Bragg and Fort Knox, to validate the 1982 test. Results of the validations were very encouraging. Legal clerks had a 98% pass rate and court reporters had a 100% pass rate. This coming SQT will be the first test for our E7s.

3. Reserve Component Items

a. On 26 June 1981, I addressed the Reserve Legal Administrator, Legal Clerk and Court Reporter Noncommissioned Officer Development Course at Sixth Army HQ, located at the Presidio of San Francisco. The program included SQT preparation, general SJA office operations, mutual support, and other topics of interest. I presented information on the JAG reserve mutual support and related training activities.

b. The reserve judge advocates assigned to Troop Program Units (TPU) provided a total of 90,726 manhours in support of active component military installations last year. This is an impressive number of manhours representing

substantial assistance to active component installations.

c. SGM John A. Purnell, the chief legal clerk at the Fifth Army SJA office, presented a six-day Instructor's Training Course, 1-6 June 1981, for reserve 71D/71E personnel, attended by 18 E-6s and above. The instructors came from all three Army areas. This allowed each Army the opportunity to teach SQT subjects at unit level and basic MOS courses for 71D/71E personnel. Based upon the projected schedules provided me by all three Army chief legal clerks, our Reserve Component personnel should receive some outstanding training this year.

4. TJAGSA Correspondence Course Catalog DA Pamphlet 351-20-17 (The Judge Advocate General's School, U.S. Army Correspondence Course Catalog) has recently been distributed. Courses available to enlisted personnel are covered in chapters 4, 5 and 6.

5. Congratulations.

a. SGM Fred A. Chiti, of Fort Bragg, North Carolina, who was selected as Soldier of the Week by the *Fayetteville Times*. SGM Chiti has been reassigned to HQ, VII Corps, in Stuttgart, Germany.

b. SP4 Brenda Sizemore, one of our new court reporters, who was an honor graduate of her class at The Naval Justice School, Newport, Rhode Island. She had an average grade of 93.36 and typing speed of 109.9 words per minute. SP4 Sizemore is now assigned to Fort Polk, Louisiana.

c. SFC Adrian Zakaluzny, for receiving the 2d Oak Leaf Cluster to the Army Commenda-

tion Medal. He earned the award by helping three people from a burning vehicle in Wheaton, Illinois. SFC Zakaluzny is presently assigned to the post SJA office at Fort McPherson, Georgia.

d. The following enlisted personnel have been selected to attend the ANCOC class of September, 1982.

71D's Legal Clerks

Sp6 Bivens James Jr.
 Sp6 Bryant Robert H.
 Sp6 Byrd John P.
 Sp6 Chamber Robert B.
 Sp6 Companion Joseph P.
 Sp6 Craycraft Thomas L.
 Sp6 Crittenden Billy R.
 Sp6 Curila Joseph
 Sp6 Deluao Alexander L.
 Sp6 Draper Larry R.
 Sp6 Dugan Tae Sun
 Sp6 Galindo Jerry III
 Sp6 Johnson George R.
 Sp6 Lebrasseur Dennis A.
 Sp6 Malikowski Thomas A.
 Sp6 Pina Lucille Thompson
 Sp6 Pleasant Charles H.
 Sp6 Shillcutt William E.
 Sp6 Valdemar Benjamin
 Sp6 Ward Donald W.
 SFC Hughes Donald D.
 SFC Marvin Diane L.
 SFC Munoz Joaquin D.
 SFC Rick Michael R.

71E's Court Reporters

Sp6 Lummus George A.
 Sp6 McCall Glenn E. Jr.
 Sp6 Powell Gregory K.

JAGC Personnel Section

PP&TO, OTJAG

1. Career Status Board

The next Career Status Board will convene on 4 November; all applications for that board should arrive in PP&TO by 8 September 1981.

2. Reassignments**LIEUTENANT COLONEL**
KIRCHNER, John**FROM**
OTJAG, Wash, DC**TO**
Ft McNair, Wash, DC**MAJOR**BROWNBAC, Peter
CHIMINELLO, Philip
SCHNEIDER, LoysonTDS, Ft Meade, MD
USAREUR
Ft Ord, CAUSALSA, Wash, DC
OTJAG, Wash, DC
Korea**CAPTAIN**ALLEMEIER, Daniel
CHAPIN, Donna
FOOTE, Warren
OLGIN, Dennis
PAINELLI, James
SIRMANS, George
STAIHAR, NickKorea
TDS, Ft. Ord, CA
TDS, Europe
Ft Gillem, GA
Ft Knox, KY
Ft Bragg, NC
KoreaFt Bragg, NC
USALSA, Wash, DC
USALSA, Wash, DC
Turkey
S&F, USMA, NY
Ft Bliss, TX
Ft Ord, CA**CHIEF WARRANT OFFICER**DANFORD, Clark
WALSH, MichaelUSAREUR
CID CMD, Wash, DCKorea
Arlington Hall, VA**WARRANT OFFICER**

HAMMER, Thomas

Madigan AMC, WA

Aberdeen PG, MD

COLONELFELDER, Ned E.
WHITE, Charles A.**MAJOR**ADAMS, William V.
ISAACSON, Scott P.
JOYCE, John F.
PAULICK, John J.
WALLIS, William L.**CHIEF WARRANT OFFICER 3**

LINDOGAM, Rosauro L.

CLE News**1. Resident Course Quotas**

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel re-

quest quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension

293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. The 1982 Government Contract Law Symposium

The faculty of the Contract Law Division of The Judge Advocate General's School are pleased to announce the following tentative topics for the 1982 Government Contract Law Symposium (formerly called the Contract Attorneys Advanced Course): "Labor and Specification Problems With CITA Contracts"; "Changes"; "New Developments in Labor Law: Davis-Bacon, Service Contract Act, and Walsh Healy Act"; "Contracting with the U.S. Government Overseas"; "Construction Contracts"; "Intellectual Property Rights"; "Remedies of Unsuccessful Offerors"; "Disputes"; and "Future Regulatory and Statutory Changes to the Acquisition System." The Symposium will be held 11-15 January 1982.

3. TJAGSA CLE Courses

September 8-11: 13th Fiscal Law Course (5F-F12).

September 21-25: 17th Law of War Workshop (5F-F42).

September 28-October 2: 63rd Senior Officer Legal Orientation (5F-F1).

October 5-7: 3rd Legal Aspects of Terrorism (5F-F43).

October 13-16: 1981 Worldwide JAGC Conference.

October 19-December 18: 97th Basic Course (5-27-C20).

October 26-29: 4th Claims (5F-F26).

November 2-6: 10th Defense Trial Advocacy (5F-F34).

November 16-20: 9th Legal Assistance (5F-F23).

November 30-December 11: 90th Contract Attorneys (5F-F10).

January 4-8: 18th Law of War Workshop (5F-F42).

January 4-15: 2nd Administrative Law for Military Installations (5F-F24).

January 11-15: 1982 Government Contract Law Symposium (5F-F11).

January 21-23: JAG USAR Workshop.

January 25-29: 64th Senior Officer Legal Orientation (5F-F1).

January 25-April 2: 98th Basic Course (5-27-C20).

February 8-12: 3rd Prosecution Trial Advocacy (5F-F32).

February 22-March 5: 91st Contract Attorneys (5F-F10).

March 8-12: 10th Legal Assistance (5F-F23).

March 22-26: 21st Federal Labor Relations (5F-F22).

March 29-April 9: 92nd Contract Attorneys (5F-F10).

April 5-9: 65th Senior Officer Legal Orientation (5F-F1).

April 20-23: 14th Fiscal Law (5F-F12).

April 26-30: 12th Staff Judge Advocate (5F-F52).

May 3-14: 3d Administrative Law for Military Installations (5F-F24).

May 12-14: 4th Contract Attorneys Workshop (5F-F15).

May 17-20: 10th Methods of Instruction.

May 17-June 4: 24th Military Judge (5F-F33).

May 24-28: 19th Law of War Workshop (5F-F42).

June 7-11: 67th Senior Officer Legal Orientation (5F-F1).

June 21-July 2: JAGSO Team Training.

June 21-July 2: BOAC (Phase VI-Contract Law).

July 12-16: 4th Military Lawyer's Assistant (512-71D/20/30).

July 19-August 6: 25th Military Judge (5F-F33).

July 26-October 1: 99th Basic Course (5-27-C20).

August 2-6: 11th Law Office Management (7A-713A).

August 9-20: 93rd Contract Attorneys (5F-F10).

August 16-May 20, 1983: 31st Graduate Course (5-27-C22).

August 23-25: 6th Criminal Law New Developments (5F-F35).

September 13-17: 20th Law of War Workshop (5F-F42).

September 20-24: 68th Senior Officer Legal Orientation (5F-F1).

October 12-15: 1982 Worldwide JAGC Conference.

October 18-December 17: 100th Basic Course (5-27-C20).

4. Civilian Sponsored CLE Courses

November

1-5: NCDA, Trial Advocacy, W. Palm Beach, FL.

1-6: NJC, Court Management, Reno, NV.

1-6: NJC, Perceiving Stereotypes in Court, Reno, NV.

2-4: AAJE, Stress and Judicial Performance, Washington, DC.

2-6: NPLTC, Family Law, Washington, DC.

5-6: HICLE, Current Developments, Honolulu, HI.

5-6: PLI, Equipment Leasing, Chicago, IL.

5-6: GTULC, State & Local Taxation, Washington, DC.

5-7: ALIABA, Medical Malpractice, Washington, DC.

5-8: AKBA, Lawyering Skills, Anchorage, AK.

6: NYSBA, Art of Discovery, New York City, NY.

6: OLCI, Bankruptcy, Cincinnati, OH.

6: GICLE, Depositions & Discovery, Augusta, GA.

6: NYSBA, Update '81, Richmond County, NY.

7-12: NLADA, 60th Annual Conference, Boston, MA.

7-12: NLADA, 61st Annual Conference, Louisville, KY.

8-13: NJC, Alcohol and Drugs, Reno, NV.

8-13: NJC, Hearing Procedures & Techniques, Reno, NV.

8-13: NJC, Technology in the Courts, Reno, NV.

8-14: NYULT, Federal Taxation, New York City, NY.

8-20: NJC, Special Court Jurisdiction, Reno, NV.

9-10: PLI, Title Insurance, New York City, NY.

12-13: PLI, EEO Litigation, New York City, NY.

12-13: PLI, Examining Expert Witnesses, San Francisco, CA.

12-14: ALIABA, Civil Practice & Litigation in Federal & State Courts, San Juan, PR.

13: OLCI, Bankruptcy, Toledo, OH.

13: GICLE, Depositions & Discovery, Columbus, GA.

13: NYSBA, Proof of Damages, New York City, NY.

15-19: NCDA, Prosecution of Violent Crime, Denver, CO.

15-20: NJC, Evidence in Special Courts, Reno, NV.

16-17: PLI, Accounting for Lawyers, New York City, NY.

16-20: FBA, Government Contracts, Washington, DC.

18-19: MIC, Selecting and Using Office Automation Systems, Cherry Hill, NJ.

18-21: NCDA, Forensic Evidence for Prosecutors, Denver, CO.

19-20: PLI, Communication Law 1981, New York City, NY.

19-20: PLI, Employment Law, Los Angeles, CA.

19-20: PLI, Litigation & Antitrust Cases, Washington, DC.

19-20: PLI, Title Insurance, Atlanta, GA.

19-20: ALIABA, Uniform Durable Power of Attorney Act, Kansas City, MO.

20: OLCI, Bankruptcy, Columbus, OH.

20: GICLE, Depositions & Discovery, Atlanta, GA.

20: HICLE, Medical Malpractice, Honolulu, HI.

30-12/1: PLI, Federal Consumer Credit Regulation, New York City, NY.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 539 Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

AICLE: Alabama Institute for Continuing Legal Education, Box CL, University, AL 36486.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALIABA: American Law Institute-American Bar Association Committee on Continuing

Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717), Washington, DC 20007

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCH: Commerce Clearing House, Inc., 4025 W. Peterson Avenue, Chicago, IL 60646.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

- GTULC:** Georgetown University Law Center, Washington, DC 20001.
- HICLE:** Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.
- ICLEF:** Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.
- ICM:** Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.
- IPT:** Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.
- KCLE:** University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.
- LSBA:** Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.
- LSU:** Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803.
- MCLNEL:** Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, A 01103.
- MIC:** Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.
- MOB:** The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.
- NCAJ:** National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.
- NCATL:** North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC. 27602.
- NCCD:** National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.
- NCDA:** National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.
- NCJFCJ:** National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.
- NCLE:** Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.
- NCSC:** National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203.
- NDAA:** National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.
- NITA:** National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104.
- NJC:** National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507.
- NLADA:** National Legal Aid & Defender Association, 1625 K Street, NW, Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.
- NPI:** National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).
- NPLTC:** National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036.
- NWU:** Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.
- NYSBA:** New York State Bar Association, One Elk Street, Albany, NY 12207.
- NYSTLA:** New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.
- NYULT:** New York University, School of Continuing Education, Continuing Education

- in Law and Taxation, 11 West 42nd Street, New York, NY 10036.
- OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.
- PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.
- PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.
- PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.
- SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.
- SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.
- SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.
- SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.
- SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.
- SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.
- UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.
- UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.
- UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.
- VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.
- VUSL: Villanova University, School of Law, Villanova, PA 19085.

Current Materials of Interest

1. Articles

Bloom, Alan, *Interpretation of Insurance Policy Coverage in the Case of Ambiguity—or How Big is the Consumer's Piece of the Rock?* 3 Whittier L. Rev. 177 (1981).

Martin, Mark E., *Note: Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U.L. Rev. 881 (1980).

Peacock, James R., III, *Comment: Developments Under the Freedom of Information Act—1980*, 1981 Duke L. J. 338.

Uelmen, Gerald F., *The Psychiatrist, the Sociopath and the Courts: New Lines for an Old Battle*, 14 Loy. L. A. L. Rev. 1 (1980).

Wellman, Richard V., *Recent Developments in the Struggle for Probate Reform*, 79 Mich. L. Rev. 501 (1981).

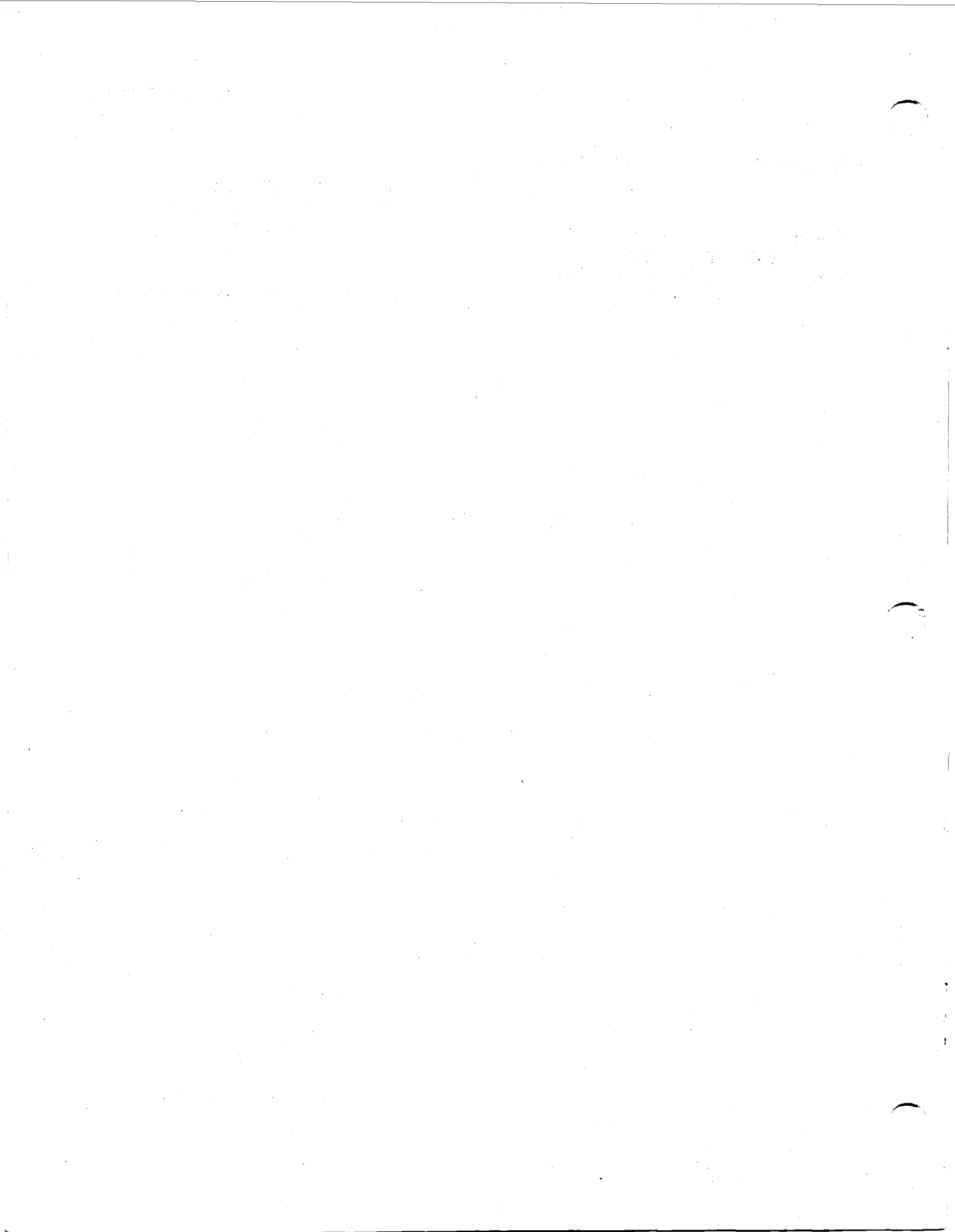
By Order of the Secretary of the Army:

Official:

ROBERT M. JOYCE
Brigadier General, United States Army
The Adjutant General

E. C. MEYER
General, United States Army
Chief of Staff

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